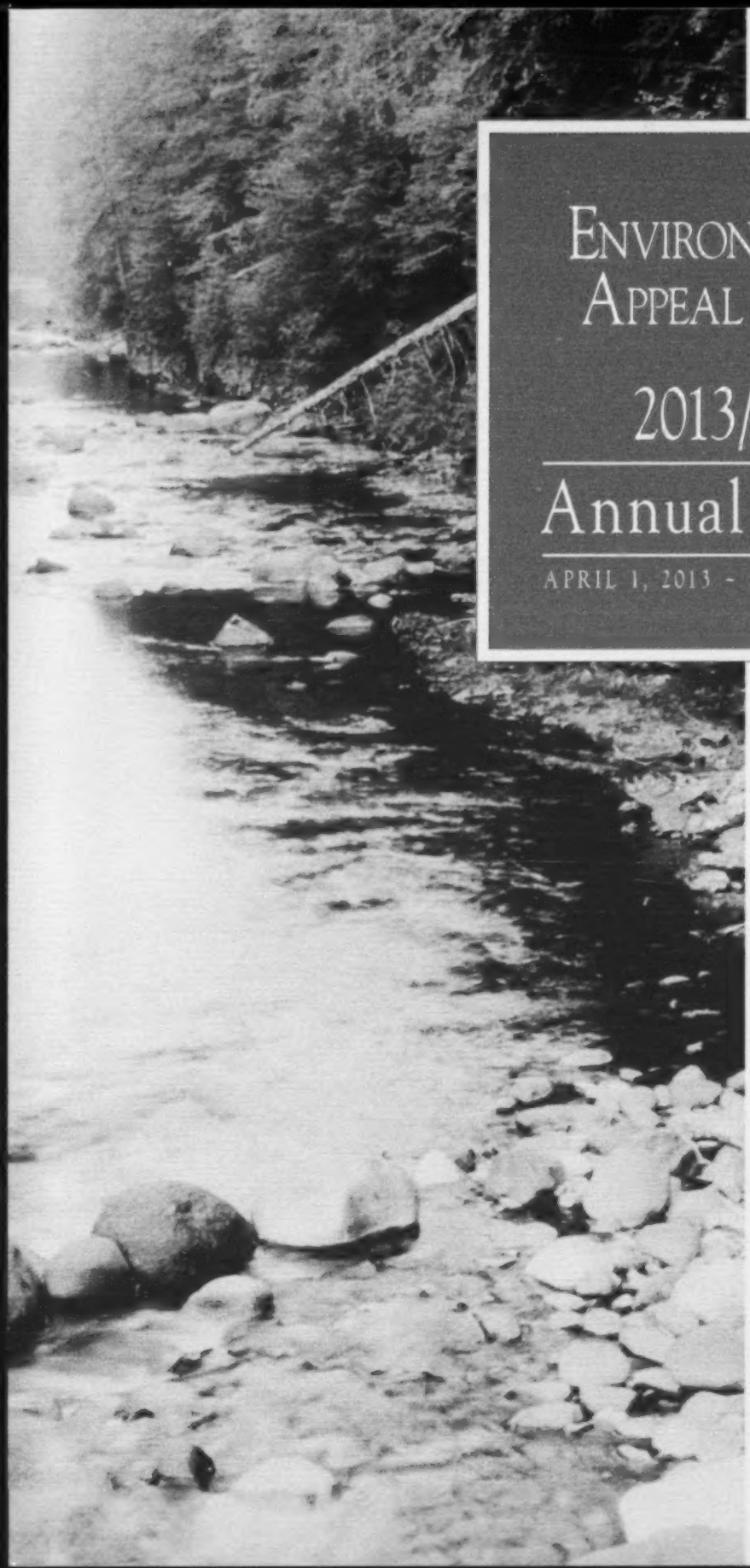

# Environmental Appeal Board

# 2013/2014 Annual Report

APRIL 1, 2013 - MARCH 31, 2014

BRITISH COLUMBIA

Environmental Appeal Board

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The Honourable Mary Polak
Minister of Environment
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The Honourable Steve Thomson
Minister of Forests, Lands and Natural Resource Operations
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V8V 1X4

Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2013 through March 31, 2014.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

AR 13/14

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**Canadian Cataloguing in Publication Data**
British Columbia. Environmental Appeal Board.
Annual report of the Environmental Appeal Board.
-- 1990 / 91 -

Annual.
Report year ends March 31.
ISSN 11-88-021X

1. British Columbia. Environmental Appeal Board - Periodicals. 2. Environmental law - British Columbia - Periodicals. 3. Pollution - Law and legislation - British Columbia - Periodicals. I.

KEB421.A49E58 354.7110082'321 C91-092316-7

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# Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2013/2014 fiscal year.

## The Year in Review – Appeals

During the past year, the Board experienced a decrease in the number of appeals filed compared to the previous year. Sixty-two appeals were filed during the 2013/2014 fiscal year, compared to 109 during 2012/2013. However, the Board was very busy during this report period, as many of the appeals filed during the previous reporting period were resolved in 2013/2014. As a result, the Board closed 83 appeals during 2013/2014, compared to 52 appeals closed during 2012/2013. In addition, 46 appeals were withdrawn, rejected, or resolved by consent of the parties, which meant that they did not require a hearing. The Board continues to work towards reducing the number of appeals that proceed to a hearing, and to reduce the costs associated with hearings. I am also pleased to note that most of these hearings were conducted by way of written submissions, which reduces costs for all parties and the Board.

## Administrative Efficiencies – a 'Cluster' of Tribunals

As the Chair of three tribunals, the Environmental Appeal Board, the Forest Appeals Commission and the Oil and Gas Appeal Tribunal, I have encouraged the "clustering" of tribunals with similar processes and/or mandates. As a result, the Board office supports a total of eight administrative tribunals. This model has numerous benefits, not only in terms of cost savings, but also in terms of shared knowledge and information. Having one office provide administrative support for several tribunals gives each tribunal greater access to resources while, at the same time, reducing costs and allowing each tribunal to operate independently of one another.

## Outside Activities

I am also pleased to report that I have been active in promoting increased administrative fairness and administrative efficiencies throughout the Tribunal community in British Columbia and nationally. During this reporting period I was re-elected to Chair the Circle of Chairs of Administrative Tribunals in British Columbia. I also sit on the Executive of both the British Columbia Council of Administrative Tribunals and the Council of Canadian Administrative Tribunals. Through these activities and in consultation with the Ministry of

Justice I have been actively involved in the Tribunal Transformation process that has been undertaken by government. I believe that the leadership and expertise that has been developed by the Board and its sister tribunals should be shared with the administrative justice community at large.

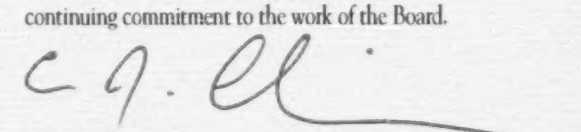
## Board Membership

The Board membership experienced some changes during the past year. I am very pleased to welcome seven new members to the Board who will complement the expertise and experience of the outstanding professionals on the Board. Those new members are Maureen Baird, Q.C., Brenda L. Edwards, Jeffrey Hand, Linda Michaluk, Howard Saunders, Daphne Stancil and Gregory J. Tucker. Also, the appointments of Dr. Robert Cameron, Bruce Devitt, Jagdeep Khun-Khun and Loreen Williams ended during this reporting period, and I wish to thank each of these distinguished individuals for their service as members of the Board.

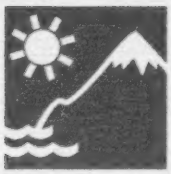
In particular I wish to single out Dr. Robert Cameron for special recognition. Dr. Cameron was first appointed to the Board in 1997 because of his expertise and experience as one of the leading environmental engineers in the jurisdiction. Since his initial appointment, Dr. Cameron has sat on and adjudicated some of the most difficult and complex appeals that have come before the Board. Dr. Cameron's expertise respecting environmental protection and his commitment to fairness have admirably served the Board, the public and the government. To this I add my thanks and appreciation.

I am very fortunate to have a Board that is comprised of highly qualified individuals who can deal with the various subjects that are heard by the Board. The current membership includes professional biologists, agrologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and administrative law. These members bring with them the necessary expertise to hear appeals on a wide range of subject matters, from landfills to irrigation permits to the possession of live wildlife.

I would like to take this opportunity to thank all Board members and staff, for their hard work and dedication over the past year and for their continuing commitment to the work of the Board.



Alan Andison
Chair



# Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period from April 1, 2013 to March 31, 2014.

The report provides an overview of the structure and function of the Board and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Board within the report period. It also contains the Board's recommendations for legislative changes to the statutes and regulations under which the Board has jurisdiction to hear appeals. Finally, a selection of summaries of the decisions issued by the Board during the report period is provided, and sections of the relevant statutes and regulations are reproduced.

Decisions of the Environmental Appeal Board are available for viewing at the Board office, on the Board's website, and at the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- University of Victoria Law Library
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Database.

Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual, which may be obtained from the Board office or viewed on the Board's website. If you have any questions or would like additional copies of this report, please contact the Board office. The Board can be reached at:

**Environmental Appeal Board**
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Victoria, British Columbia
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Facsimile: 250-356-9923

**Website Address:** www.eab.gov.bc.ca

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PO Box 9425 Stn Prov Govt
Victoria, British Columbia
V8W 9V1

# The Board

The Environmental Appeal Board is an independent, quasi-judicial tribunal established on January 1, 1982 under the *Environment Management Act*, and continued under section 93 of the *Environmental Management Act*. As an adjudicative body, the Board operates at arms-length from government to maintain the necessary degree of independence and impartiality. This is important because it hears appeals from administrative decisions made by government officials under a number of statutes.

For the most part, decisions that can be appealed to the Board are made by provincial and municipal government officials under the following six statutes, the relevant provisions of which are administered by the Minister identified: the *Environmental Management Act*, the *Integrated Pest Management Act*, and the *Greenhouse Gas Reduction (Cap and Trade) Act*, administered by the Minister of Environment; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* administered by the Minister of Energy and Mines; and the *Wildlife Act* and the *Water Act*, administered by the Minister of Forests, Lands and Natural Resource Operations. The legislation establishing the Board is administered by the Minister of Justice and Attorney General of BC.

The Board makes decisions regarding the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Board must decide its appeals by weighing the evidence before it, making findings of fact, interpreting the legislation and the common law and applying the law and legislation to the facts.

In carrying out its functions, the Board has the powers granted to it under the above-mentioned statutes, as well as additional powers provided under the *Administrative Tribunals Act*, including the ability to compel persons or evidence to be brought before the Board. The Board also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Board and the administration of the Board are governed by the *Administrative Tribunals Appointment and Administration Act*.

## Board Membership

Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 93(3) of the *Environmental Management Act*. The members appointed to the Board are highly qualified individuals, including professional biologists, professional foresters, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Board members, including the chair, are set out in the *Administrative Tribunals Appointment and Administration Act*, as are other matters relating to the appointments. This Act also sets out the responsibilities of the chair.

The Board members during this report period were as follows:

| The Board | Profession | From |
|---|---|---|
| **Chair** | | |
| Alan Andison | Lawyer | Victoria |
| **Vice-chair** | | |
| Robert Wickett, Q.C. | Lawyer | Vancouver |
| **Members** | | |
| Maureen Baird, Q.C. (from October 10, 2013) | Lawyer | West Vancouver |
| R. O'Brian Blackall | Land Surveyor | Charlie Lake |
| Robert Cameron (until December 31, 2013) | Professional Engineer | North Vancouver |
| Monica Danon-Schaffer | Professional Engineer | West Vancouver |
| Cindy Derkaz | Lawyer (Retired) | Salmon Arm |
| W.J. Bruce Devitt (until December 31, 2013) | Professional Forester (Retired) | Esquimalt |
| Brenda L. Edwards (from December 31, 2013) | Lawyer | Victoria |
| Tony Fogarassy | Geoscientist/Lawyer | Vancouver |
| Les Gyug | Professional Biologist | Westbank |
| James Hackett | Professional Forester | Nanaimo |
| Jeffrey Hand (from December 31, 2013) | Lawyer | Vancouver |
| R.G. (Bob) Holtby | Professional Agrologist | Westbank |
| Jagdeep Khun-Khun (until December 31, 2013) | Lawyer | Vancouver |
| Gabriella Lang | Lawyer (Retired) | Campbell River |
| Blair Lockhart | Lawyer/Geoscientist | Vancouver |
| Ken Long | Professional Agrologist | Prince George |
| James S. Mattison | Professional Engineer | Victoria |
| Linda Michaluk (from December 31, 2013) | Professional Biologist | North Saanich |
| Howard Saunders (from December 31, 2013) | Forestry Consultant | Vancouver |
| David H. Searle, C.M., Q.C. | Lawyer (Retired) | North Saanich |
| Daphne Stancil (from February 28, 2014) | Lawyer/Biologist | Victoria |
| Gregory J. Tucker (from December 31, 2013) | Lawyer | Vancouver |
| Douglas VanDine | Professional Engineer | Victoria |
| Reid White | Professional Engineer/Professional Biologist (Ret.) | Dawson Creek |
| Loreen Williams (until December 31, 2013) | Lawyer/Mediator (Retired) | West Vancouver |

## Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. This law has developed to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Board is governed by the principles of administrative law and, as such, must treat all parties involved in a hearing before the Board fairly, giving each party a chance to explain its position.

Appeals to the Board are decided on a case-by-case basis. Unlike a court, the Board is not bound by its previous decisions; present cases of the Board do not necessarily have to be decided in the same way that previous ones were.

## The Board Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Board shares its staff and its office space with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting eight tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

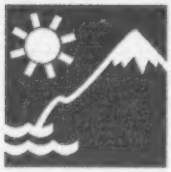
## Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If a member of the public requests information regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*.

Parties to appeals should be aware that information supplied to the Board is subject to public scrutiny and review.

In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report.



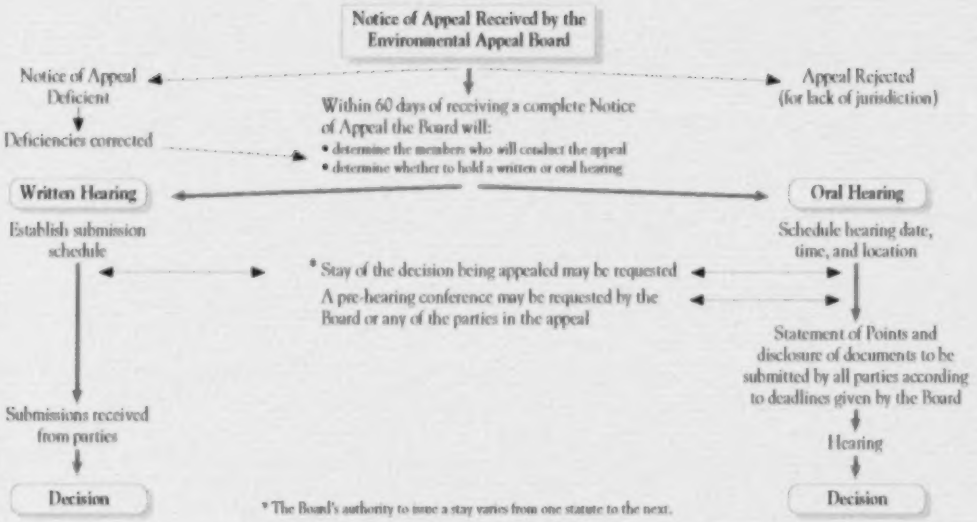
# The Appeal Process

## General Powers and Procedures of the Board

Part 8, Division 1 of the *Environmental Management Act* sets out the basic structure, powers and procedures of the Board. It describes the composition of the Board and how hearing panels may be organized. It also describes the authority of the Board to add parties to an appeal, the rights of the parties to present evidence, and the Board's power to award costs. Additional procedural details, such as the requirements for starting an appeal, are provided in the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82. The relevant portions of the Act and the *Regulation* are included at the back of this report.

In addition to the procedures contained in the Act and the *Regulation*, the Board has developed its own policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. To ensure that the appeal process is open and understandable to the public, these policies and procedures have been set out in the Environmental Appeal Board Procedure Manual which is posted on the Board's website. Also on the Board's website are a number of "Information Sheets" on specific topics and specific stages of the appeal process. The Board has also created a new Notice of Appeal form that can be filled out on line.

Finally, in order to determine what decisions are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision under appeal, and what the Board's decision-making powers are with respect to the appeal, one must consult the individual statutes and regulations which provide the right of appeal to the Board. A summary of the appeal provisions in the individual statutes is provided below.


Notice of Appeal Received by the Environmental Appeal Board
Notice of Appeal Deficient
Deficiencies corrected
Appeal Rejected (for lack of jurisdiction)
Within 60 days of receiving a complete Notice of Appeal the Board will:
• determine the members who will conduct the appeal
• determine whether to hold a written or oral hearing
Written Hearing
Oral Hearing
Establish submission schedule
Schedule hearing date, time, and location
* Stay of the decision being appealed may be requested
A pre-hearing conference may be requested by the Board or any of the parties in the appeal
Statement of Points and disclosure of documents to be submitted by all parties according to deadlines given by the Board
Submissions received from parties
Hearing
Decision
Decision
* The Board's authority to issue a stay varies from one statute to the next.

## The Basics: who can appeal, what can be appealed and when to appeal

As stated above, to determine what decisions are appealable to the Board, who can appeal the decisions and the time for filing an appeal, as well as the Board's power to issue a stay, the individual statutes and regulations which provide the right of appeal to the Board must be consulted. The following is a summary of the individual statutes and the provisions that answer these questions.

## *Environmental Management Act*

The *Environmental Management Act* regulates the discharge of waste into the environment, including the regulation of landfills and the clean-up of contaminated sites in BC, by setting standards and requirements, and empowering government officials to issue permits, approvals, operational certificates, and orders, and to impose administrative penalties for non-compliance. Waste regulated by this Act includes air contaminants, litter, effluent, refuse, biomedical waste, and special wastes.

The decisions that may be appealed under the *Environmental Management Act* are set out in Part 8, Division 2. That division states that a person "aggrieved by a decision" of a director or a district director may appeal that decision to the Board. An appealable "decision" is defined as follows:

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed *[under section 115(5), a director may enter into an agreement with a person who is liable for an administrative penalty; the agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the director considers necessary or desirable].*

The Board has interpreted the phrase "person aggrieved" to mean that an appellant must establish that he or she has a genuine grievance because a decision has been made which prejudicially effects his or her interests.

The time limit for filing an appeal of a decision is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

## *Greenhouse Gas Reduction (Cap and Trade) Act*

The *Greenhouse Gas Reduction (Cap and Trade) Act* requires operators of BC facilities emitting 10,000 tonnes or more of carbon dioxide equivalent emissions per year to report their greenhouse gas emissions to the government, and empowers government officials to impose administrative penalties for non-compliance.

Under this Act, certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 18 of the *Act [imposed administrative penalties: failure to retire compliance units]* or of the extent of that non-compliance, as set out in an administrative penalty notice;*
- the determination of non-compliance under section 19 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;*

*Sections 18 and 19 of the Act are not yet in force.

- a decision under section 13(7) of the *Reporting Regulation [approval of alternative methodology for 2010]*; and
- a decision under section 14(2) of the *Reporting Regulation [approval of change of methodology]*.

According to the *Reporting Regulation*, B.C. Reg. 272/2009, the time limit for filing an appeal of a decision is 30 days after notice of the decision is given, and the Board may order a stay of the decision under appeal.

## *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government, and empowers government officials to impose administrative penalties for non-compliance.

Certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 11 of the *Act [imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;
- the determination of non-compliance under section 12 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

- a refusal to accept an alternative calculation of carbon intensity under section 6(5)(d)(ii)(B) of the Act *[low carbon fuel requirement]*; and
- a prescribed decision or a decision in a prescribed class.

According to the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. Reg. 394/2008, the time limit for commencing an appeal is 30 days after the decision is served. The Board is not empowered to order a stay of the decision under appeal.

## *Integrated Pest Management Act*

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application and disposal of pesticides in BC. This *Act* requires permits to be obtained for certain pesticide uses, and requires certain pesticide applicators to be certified. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect, and it empowers government officials to impose administrative penalties for non-compliance.

Under this *Act*, the right of appeal (those with standing to appeal) is quite broad. The *Act* states that "a person" may appeal a decision under this Act to the Board. "Decision" is then defined as:

(a) making an order, other than an order under section 8 *[an order issued by the Minister of Environment]*;

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty; and

(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed *[under section 23(4), the administrator may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the administrator considers necessary or desirable]*.

The time limit for filing an appeal of a decision is 30 days after the date the decision being appealed is made.

The Board can order a stay of the decision under appeal.

## *Water Act*

The *Water Act* regulates the diversion, use and allocation of surface water, regulates work in and about streams, regulates the construction and operation of ground water wells, and empowers government officials to issue licences, approvals, and orders.

The decisions that may be appealed under the *Water Act*, and the people who may appeal them, are set out in section 92(1) of the *Act*. The *Act* states that an order of the comptroller, the regional water manager or an engineer may be appealed to the Board by the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order, or a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

In addition, an order of the comptroller, the regional water manager or an engineer made under Part 5 *[Wells and Ground Water Protection]* or Part 6 *[General]* of the Act in relation to a well, works related to a well, ground water or an aquifer may be appealed to the Board by the person who is subject to the order, the well owner, or the owner of the land on which the well is located.

Finally, an order of the comptroller, the regional water manager or an engineer made in relation to a well drilling authorization under section 81 of the Act may be appealed to the Board by the person who is subject to the order, the well owner, the owner of the land on which the well is located, or a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

It should be noted that a licensee cannot appeal an order of the comptroller or a regional water manager to cancel a licence if the cancellation was because the licensee failed to pay the rentals due to the government for three years, or if the licence was cancelled on the grounds of failure to pay the water bailiff's fees for six months.

The time limit for filing an appeal is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

## *Wildlife Act*

The *Wildlife Act* regulates the use, allocation, ownership, import and export of fish and wildlife in BC, and empowers government officials to issue licences, permits, certificates, and orders, and to impose administrative penalties for non-compliance. Activities regulated by this Act include hunting, angling in non-tidal waters, guide outfitting, and trapping.

Under section 101.1 of the *Wildlife Act*, a decision of a regional manager or the director that affects a licence, permit, registration of a trapline or guiding territory certificate, or an application for any of those things, may be appealed by the person who is affected by the decision.

The time limit for filing an appeal under the *Wildlife Act* is 30 days after notice is given.

The Board can order a stay of the decision under appeal.

## Starting an Appeal

For all appeals, an appellant must prepare a notice of appeal and deliver it to the Board office within the time limit specified in the relevant statute. The notice of appeal must comply with the content requirements of the *Environmental Appeal Board Procedure Regulation*. It must contain the name and address of the appellant, the name of the appellant's counsel or agent (if any), the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested. Also, the notice of appeal must be signed by the appellant, or on his or her behalf by their counsel or agent, and the notice must be accompanied by a fee of $25 for each action, decision or order appealed. The Board has created a Notice of Appeal form that may be filled out on-line.

In addition, the Board requires a copy of the permit, licence, order or decision being appealed.

Generally, if the Board does not receive a notice of appeal within the specified time limit, the appellant will lose the right to appeal.

If the notice of appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Board will notify the office of the official who made the decision being appealed. The decision-maker will be the respondent in the appeal.

## Parties and Participants to an Appeal

A party to an appeal has a variety of important rights: the right to present evidence, cross-examine the witnesses of the other parties, and make opening and closing arguments. The person who filed the appeal (the appellant) and the decision-maker (the respondent) are parties to the appeal.

In addition to the appellant and respondent, the Board may add other parties to an appeal. As a standard practice, the Board will offer party status to a person who may be affected by the appeal such as the person holding the permit or licence which is the subject of an appeal by another person. In addition, a person may apply to the Board to become a party to the appeal if he or she may be affected by the Board's decision. These additional parties are referred to as "third parties" to the appeal.

The Board also has the discretion to invite any person to be heard in the appeal, without making that person a party to the appeal. This may be done on the Board's initiative or as a result of a request. The Board refers to these people as "participants." If a person applies to participate in an appeal, the Board will decide whether the person should be granted participant status and, if so, the extent of that participation. In all cases, a participant may only participate in a hearing to the extent that the Board allows.

## Stays

A "stay" has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal until the Board has held a hearing, and issued its decision on the appeal.

The Board has the power to stay all decisions under appeal, except for decisions appealed under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*. However, a stay is not granted in every case: it is an extraordinary remedy that a person must specifically apply for. For the Board to grant a stay, the applicant must satisfy a particular test. That test is described later in this report under the heading "Summaries of Decisions: Preliminary Applications."

## Dispute Resolution

The Board encourages parties to resolve the issues underlying the appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval. Alternatively, the appellant may withdraw his or her appeal at any time.

## Pre-hearing Conferences

The Board, or any of the parties to any appeal, may request a pre-hearing conference. Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Board member and one staff member from the Board office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

## Scheduling a Hearing

The *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing. A hearing may be conducted by way of written submissions, an oral (in person) hearing, or a combination of both.

If the chair decides that the issues in the appeal can be fairly decided on the basis of written submissions, the chair will schedule a written hearing. Prior to ordering a written hearing, the Board may request the parties' input.

If the chair decides that an oral (in person) hearing is required in the circumstances, the chair must set the date, time and location of the hearing and notify the parties, the applicant (if different from the appellant) and any objectors (as defined in the *Environmental Appeal Board Procedure Regulation*). It may be held in the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province.

Regardless of the type of hearing scheduled, the Board has the authority to conduct a "new hearing" on the matter before it. This means that the Board may hear the same evidence that was before the original decision-maker, as well as receive new evidence.

## Written Hearings

If it is determined that a hearing will be by way of written submissions, the chair will invite all parties to provide submissions and will establish the due dates for the submissions. The general order of submissions is as follows. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

## Oral Hearings

Oral (in person) hearings are normally scheduled in cases where there is some disagreement on the facts underlying the dispute; where there is a need to hear the parties' evidence and assess the credibility of witnesses.

To ensure the hearing proceeds in an expeditious and efficient manner, in advance of the hearing, the chair asks the parties to provide the Board, and each of the parties to the appeal, with a written Statement of Points (a summary of the main issues, evidence, witnesses, and arguments to be presented at the hearing) and all relevant documents.

Board hearings are less formal than hearings before a court. However, some of the Board's oral hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination. In addition, parties to the appeal may have lawyers representing them at the hearing, but this is not required. The Board will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Board are open to the public.

## Evidence

The Board has full discretion to receive any information that it considers relevant and will then determine what weight to give the evidence when making its decision.

## Experts

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge."

The Board is not bound by the provisions relating to expert evidence in the *BC Evidence Act*. However, the Board does require 60 days advance notice that expert evidence will be given at a hearing. The notice must include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

## Obtaining an Order for Attendance of a Witness or Production of Documents

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring the person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Section 93(11) of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act* provide the Board with the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

## The Decision

To make its decision, the Board is required to determine, on a balance of probabilities, what occurred and to decide the issues raised in the appeal.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable time following the hearing. Copies of the decision will be given to the parties, the participants, and the appropriate minister(s).

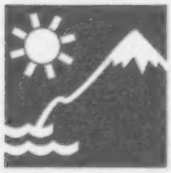
There is no right of appeal to the courts from a Board decision. Section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

Alternatively, a party dissatisfied with a decision or order of the Board may apply to the BC Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*.

## Costs

The Board also has the power to award costs. In particular, it may order a party to pay all or part of the costs of another party in connection with the appeal. The Board's policy is to only award costs in special circumstances.

In addition, if the Board considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.



# Legislative Amendments Affecting the Board

During this report period, there were no legislative changes that affected the types of appeals the Board hears, or the Board's powers or procedures.

# Recommendations

During this reporting period, the Board has three recommendations.

## Auctions under the *Wildlife Act*

The first recommendation arises from two separate appeals under the *Wildlife Act* (Decision Nos. 2013-WIL-036(a) Francis Baller v. Regional Manager and 2013-WIL-043(a) Fernie Corbel v. Regional Manager), (see the Baller decision summary at page 50) which raised issues regarding how Regional Managers determine the value of dead wildlife and wildlife parts when deciding whether to issue a permit transferring the right of property in dead wildlife or wildlife parts from the government to a person. Ownership of all wildlife in the Province is vested in the government, and a person can only acquire a right of property in wildlife through a permit or licence, or by lawfully killing the wildlife.

Under section 2(p) of the *Permit Regulation*, B.C. Reg. 253/2000 (the "*Permit Regulation*"), a Regional Manager may issue a permit transferring the right of property in dead wildlife or wildlife parts to a person, subject to certain limitations. One of those limitations is set out in section 6(1)(d) of the *Permit Regulation*, which prohibits a Regional Manager from issuing a permit under section 2(p) if the value of the dead wildlife or wildlife parts is greater than $200, subject to two narrow exceptions. Section 6(2) provides that the value of wildlife or wildlife parts for the purpose of section 6(1)(d) is to be determined by the Regional Manager "based on the average price the government receives at an auction" for similar dead wildlife or wildlife parts.

In both of the appeals, the appellant had applied for a permit to keep dead wildlife (a snowy owl in one case, and a wolverine in the other case) that was found on a roadside, for personal use. In separate decisions issued by different Regional Managers in early 2013, the appellants' respective permit applications were denied on the basis that the value of the dead wildlife in each case exceeded $200 based on government auctions conducted several years earlier. In both appeals, the Regional Managers confirmed that the government had not held an auction of dead wildlife or wildlife parts since 2012. Based on that evidence, the Board concluded that the value of dead wildlife and wildlife parts has, in effect, become 'frozen' in time, given the requirement in section 6(2) of the *Permit Regulation*. The Board held that, as more time passes, this creates a risk that the application of section 6(2) of the *Permit Regulation* may lead to absurd results, and/or reduce confidence in valuations to the point where the accuracy of a valuation will be unknown.

**Recommendation:** the Board recommends that the government consider amending section 6(2) of the *Permit Regulation* if the government no longer intends to conduct auctions of dead wildlife and wildlife parts.

## Notice under the *Water Act*

The second recommendation arises from a group of appeals under the *Water Act* (Decision Nos. 2013-WAT-015(a), 017(a), 018(a), and 019(a) Greg Whynacht; Ian R. Poyntz; Catherine Willows Woodrow; Michael Dix (on behalf of himself and the Cowichan Lake Recreational Community Inc.) v. Deputy Comptroller of Water Rights, which raised a preliminary issue regarding the interpretation and application of the notice provisions in that *Act*. (See the decision summary at page 26 and 27 of this report.) The appeals were filed by owners of lakefront property who claimed that they, as riparian owners, were affected by an order issued to a downstream water licensee. Before the appeals were heard, the licensee raised a question regarding when the 30-day period to appeal began to run: when the licensee was notified of the order; or alternatively, when the riparian owners affected by the order were notified of the order. This required the Board to consider the language in section 92(4) of the *Water Act*, which provides that the "time limit for commencing an appeal is **30 days after notice of the order being appealed** is given to the **person subject to the order**... ." The Board's decision hinged upon whether the phrase "persons subject to the order" should be interpreted to include only the person to whom the order was issued (i.e., the licensee in this case), or alternatively, to include other persons with appeal rights, such as the riparian owners affected by the order. The Board found that, if the former interpretation was adopted, all potentially affected property owners, riparian owners, and other classes of persons who are entitled to appeal under section 92(1) of the *Water Act* would be left in the untenable situation of having no idea when the 30-day appeal period began to run, and when it would expire, as they would likely be unaware of when the person to whom the order was issued received the order. Based on those considerations, the Board rejected this interpretation in favour of the latter interpretation. However, this issue highlighted the potential for confusion and unfairness in future cases. The Board noted that the government could remedy this, given that section 101(2)(d) of the *Water Act* provides the Lieutenant Governor in Council (i.e., Cabinet) with the power to make regulations "specifying how notice of a decision may be given for the purposes of section 92(4)(b) [appeals to Environmental Appeal Board]."

**Recommendation:** the Board recommends that the government consider making a regulation under sections 92(4)(b) and 101(2)(d) of the *Water Act* to clarify the notice provisions in the *Water Act*, to ensure that persons with a right of appeal under the *Water Act* have clear direction on when the 30-day appeal period begins.

## Minor Contributor Status under the *Environmental Management Act*

The third recommendation arises from a group of related appeals under the *Waste Management Act* (Decision Nos. 1998-WAS-018(c) and 1998-WAS-031(a), Halme's Auto Service Ltd. and Petro Canada Limited (now known as Suncor Energy Inc.) v. Regional Waste Manager) (see summary on page 37). The appeals were against two separate decisions issued by a Regional Manager, and were filed by present and past owners and/or operators of a gasoline station where portions of the soil and groundwater became contaminated with petroleum products. The appeals were against an order requiring the persons who were responsible for the contamination to remediate the contamination, and a determination that one of those persons was a minor contributor to the contamination. The determination limited that person's liability to 4.5% of the total

remediation costs, and purported to be binding on a court in the event that any of the persons named in the remediation order initiated a court action to recover their remediation costs from the other persons responsible for the contamination. Without the determination, a court deciding an action to recover remediation costs would have full discretion to allocate liability among the persons responsible for the contamination, based on the evidence before the court.

One of the issues raised by the appeals was whether the determination was invalid because section 27.3(3) of the *Waste Management Act* (now section 50(3) of the *Environmental Management Act*) encroached on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*, and therefore, was invalid and of no force or effect as it was beyond the legislative power of the Province. Based on a legal test formulated by the Supreme Court of Canada, the Board found that the power to make a minor contributor determination is constitutionally invalid because it: (1) broadly conforms to the superior courts' jurisdiction at the time of Confederation to decide disputes involving liability for damage to land caused by the discharge of harmful substances; (2) is adjudicative or judicial in nature; and (3) is not a prerequisite for, and is not necessarily incidental to, the timely remediation of contaminated sites, which is the key purpose of the legislation. As an administrative tribunal, the Board has no authority to declare legislation to be invalid; rather, the Board may read the legislation without the impugned section. Consequently, the Board concluded that there is no statutory authority to make a determination of minor contributor status under section 27.3(3) of the *Waste Management Act*, and the determination in this case was void.

Although the *Waste Management Act* has been repealed and replaced by the *Environmental Management Act*, the latter statute contains an identical power to make minor contributor determinations under section 50(3). Consequently, the Board's finding that section 27.3(3) of the *Waste Management Act* is unconstitutional is equally applicable to section 50(3) of the *Environmental Management Act*.

**Recommendation:** the Board recommends that the government repeal section 50(3) of the *Environmental Management Act*, or amend it so that it no longer encroaches on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*.

# Statistics

The following tables provide information on the appeals filed with the Board, and decisions published by the Board, during this reporting period. The Board publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Board also issues hundreds of unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between April 1, 2013 and March 31, 2014, a total of 62 appeals were filed with the Board against 47 administrative decisions, and a total of 78 decisions were published. No appeals were filed or heard under the *Integrated Pest Management Act*, the *Greenhouse Gas Reduction (Cap and Trade) Act* or the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

## April 1, 2013 – March 31, 2014

| | |
|---|---|
| **Total appeals filed** | **62** |
| **Total appeals closed** | **84** |
| **Appeals abandoned or withdrawn** | **32** |
| **Appeals rejected, jurisdiction/standing** | **12** |
| Hearings held on the merits of appeals: | |
| Oral hearings completed | 7 |
| Written hearings completed | 36 |
| ***Total hearings held on the merits of appeals** | **43** |
| **Total oral hearing days** | **68** |
| **Published Decisions issued:** | |
| **Final Decisions (excluding consent orders)** | |
| Appeals allowed | 4 |
| Appeals, allowed in part | 15 |
| Appeals dismissed | 20 |
| **Total Final Decisions** | **39** |
| **Decisions on preliminary matters** | **36** |
| **Decisions on Costs** | **1** |
| **Consent Orders** | **2** |
| **Total published decisions** | **78** |

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This table provides an overview of the total appeals filed, hearings held, and published decisions issued by the Board during the report period. It should be noted that the number of decisions issued and hearings held during the report period does not necessarily reflect the number of appeals filed for the same period, because the appeals filed in previous years may have been heard or decided during the report period.

It should also be noted that two or more appeals may be heard together.

**Note:**

* Most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

## Appeal Statistics by Act

| | Environmental Management | Greenhouse Gas Reduction (Cap and Trade Act) | Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements Act) | Integrated Pest Management | Waste Management | Water | Wildlife | Total |
|---|---|---|---|---|---|---|---|---|
| Appeals filed during report period | 19 | | | | | 33 | 10 | 62 |
| Appeals closed – final decision issued | 2 | | | | 2 | 22 | 13 | 39 |
| Appeals abandoned or withdrawn | 6 | | | | 1 | 15 | 10 | 32 |
| Appeals rejected jurisdiction/ standing | 6 | | | | | 3 | 3 | 12 |
| **Hearings held on the merits of appeals** | | | | | | | | |
| Oral hearings | 1 | | | | | 6 | | 7 |
| Written hearings | 1 | | | | 1 | 2 | 32 | 36 |
| Total hearings held on the merits of appeals | 2 | | | | 1 | 8 | 32 | 36 |
| Total oral hearing days | 25 | | | | | 43 | | 68 |
| **Published decisions issued** | | | | | | | | |
| Final decisions | 2 | | | | 2 | 22 | 13 | 39 |
| Costs decisions | | | | | | | 1 | 1 |
| Applications for security for costs | 1 | | | | | | | 1 |
| Preliminary applications | 21 | | | | | 14 | | 35 |
| Consent orders | 1 | | | | | | 1 | 2 |
| **Total published decisions issued** | | | | | | | | 78 |

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This table provides a summary of the appeals filed, hearings held and published decisions issued by the Board during the report period, categorized according to the statute under which the appeal was brought.

# Summaries of Board Decisions

## April 1, 2013 ~ March 31, 2014

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. As noted earlier in this report, once an appeal is filed, the chair of the Board will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Board. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the decisions required.

In terms of its decision-making authority, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, under all of the statutes, a panel may also send the matter back to the original decision-maker with or without directions, or make any decision that the original decision-maker could have made and that the panel believes is appropriate in the circumstances. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed." If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that he or she asked for, the appeal is said to be "allowed in part." When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Board upholds the original decision, the appeal is said to be "dismissed."

Not all appeals proceed to a hearing and a decision by the Board. Some cases are withdrawn or abandoned by an appellant before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Board's jurisdiction over the appeal may be challenged, resulting in the Board dismissing the appeal in a preliminary decision. In addition, the Board is called upon to make a variety of other preliminary decisions, some which are reported and others that are not. Examples of some of the preliminary decisions made by the Board have been provided in the summaries below.

It is also important to note that many cases are also settled or resolved prior to a hearing. The Board encourages parties to resolve the matters under appeal either on their own or with the assistance of the Board. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Board to approve the order. The consent order then becomes an order of the Board. The Board has included a description of a consent order in the summaries.

The summaries that have been selected for this Annual Report reflect the variety of subjects and the variety of issues that come before the Board in any given year. The summaries have been organized into preliminary applications decided by the Board, and decisions on the merits of the appeal. The summaries of final decisions are further organized by the statute under which the appeal was filed. Please refer to the Board's website to view all of the Board's published decisions and their summaries.

# Preliminary Applications and Decisions

## Jurisdictional Issues

For the Board to have jurisdiction over an appeal, certain requirements in the Board's enabling legislation must be met. Generally, the legislation sets out requirements such as the categories of decisions that may be appealed, the categories of persons who may file appeals, and the time limits for filing an appeal. All of the applicable legislative requirements must be met before the Board has jurisdiction to hear an appeal.

Over the years, there have been many cases in which the Board has been asked to determine, as a preliminary matter, whether the person filing an appeal has "standing" to appeal, i.e., whether the person falls within a category of persons who may file an appeal under a specific Act. The requirements for "standing" vary from one Act to another. For example, under section 101(1) of the *Environmental Management Act*, an appeal may be initiated by a "person aggrieved by a decision." However, under section 92(1) of the *Water Act*, an appeal may be initiated by "the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order, or a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order."

Similarly, the Board must sometimes make a preliminary determination about whether the decision or order being appealed is appealable under the applicable legislation, as the types of decisions or orders that may be appealed vary from one Act to another. For example, specific types of decisions may be appealed under the *Wildlife Act*. Section 101(1) of that Act requires a director or regional manager to give written reasons for "a decision that affect… a licence, permit, registration of a trapline or guiding territory certificate held by a person, or an application by a person for *[any of those things]*." Section 101(2) states that notice of a decision referred to in subsection (1) must be given to the affected person. Section 101.1 of the Act states that "The affected person referred to in section 101(2) may appeal the decision" to the Board. Thus, the decisions that are referred to in section 101(1) may be appealed to the Board.

The following summaries include examples of preliminary decisions regarding who has "standing" to appeal, and whether an appeal has been filed in a timely manner.

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### Notice provisions under the *Water Act* cause confusion about when the 30-day appeal period begins

2013-WAT-015(a) and 2013-WAT-017(a) to 2013-WAT-019(a) Greg Whynacht, Ian R. Poyntz, Catherine Willows Woodrow, and Michael Dix (on his own behalf and on behalf of the Cowichan Lake Recreational Community Inc.) v. Deputy Comptroller of Water Rights (Catalyst Paper Corporation, Third Party)

**Decision Date:** August 23, 2013

**Panel:** Alan Andison

Six appeals were filed against an order issued to Catalyst Paper Corporation ("Catalyst") by the Deputy Comptroller. The order revised the

operation of the storage works on Cowichan Lake which are regulated under a water licence held by Catalyst. Notice of the order was sent to Catalyst by email on May 30, 2013. Notice of the order was also sent to numerous persons, including owners of waterfront property on Cowichan Lake, who had previously notified the Comptroller that they objected to the proposal. The "objectors" were notified of the order in letters dated June 4, 2013, which were sent by registered mail.

Shortly after the Board received the appeals, Catalyst made a preliminary application requesting that four of the appeals be dismissed for lack of jurisdiction, on the basis that those appeals were filed after the expiry of the 30-day appeal period established under section 92(4) of the *Water Act*. Catalyst submitted that subsection 92(4)(a) of the *Water Act* states that the time limit for filing an appeal is "30 days after notice of the order being appealed is given… to the person subject to the order." Catalyst argued that it is the "person subject to the order," and the 30-day appeal period started when it received notice of the order on May 30, 2013. Catalyst submitted, therefore, that the appeals filed after July 2, 2013, by Greg Whynacht, Ian R. Poyntz, Catherine Willows Woodrow, and Michael Dix (collectively referred to as the "Appellants") were too late, as the Board has no jurisdiction to extend the appeal period. However, Catalyst accepted that two appeals filed by other individuals were received by the Board within the 30-day appeal period. The Board invited all parties to provide written submissions on the issue of when the 30-day period to appeal the order began.

The Board noted that, although subsection 92(4)(b) of the *Water Act* states that notice of an order may also be given "in accordance with the regulations," no such regulations have been made; therefore, the 30-day appeal period under subsection 92(4)(a) applies. The Board also noted that section 92(1) of the *Water Act* provides three groups of persons with standing to appeal an order issued under the *Water Act*: (a) the person who is subject to the order; (b) an owner whose land is or is likely to be physically affected by the order; or (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order. The four Appellants are all riparian owners and/or persons whose land is or is likely to be physically affected by the order. The Board found that, if it accepted Catalyst's interpretation of section 92(4)(a), then all persons who would have a right of appeal under section 92(1), except Catalyst, would be left in an untenable situation, because the appeal period would begin when Catalyst received the order, yet they would not know when Catalyst received the order, and therefore, they would not know when the appeal period began or would expire. The Board found that given the potential impact of such orders on these classes of persons, Catalyst's interpretation cannot be what the Legislature intended. The Board held that section 92(4)(a) should be given a fair, large and liberal interpretation, consistent with section 8 of the *Interpretation Act*, and held that the four Appellants were "persons subject to the order," given the breadth and terms of the order in this case.

The Board found that the four Appellants received notice of the order on June 5 and 6, 2013, and that they filed their Notices of Appeal on July 3 and 4, 2013, respectively. Accordingly, their appeals were filed within the 30-day appeal period.

In addition, the Board noted that the issue raised by Catalyst highlighted the potential for confusion and unfairness in other cases, and the Board recommended that the Ministry consider making a regulation under sections 92(4)(b) and 101(2)(d) of the *Water Act* to ensure that appellants have clear direction on when the appeal period begins.

Accordingly, the application to dismiss the appeals as having been filed after the expiry of the 30 day appeal period was denied.

## Only "persons aggrieved" may appeal under the *Environmental Management Act*

2013-EMA-005(a), 2013-EMA-007(a), 2013-EMA-008(a), 2013-EMA-009(a), 2013-EMA-010(a), 2013-EMA-011(a) and 2013-EMA-012(a) Lynda Gagne, Emily Toews, Charles Henry Claus, Pamela Vollrath, Elisabeth Stannus, Skeena Wild Conservation Trust, and Lakelse Watershed Stewards Society v. Director, *Environmental Management Act* (Rio Tinto Alcan Inc., Third Party/Permit Holder)
**Decision Date:** October 31, 2013
**Panel:** Alan Andison

Seven appeals were filed against a decision of the Director to amend a permit held by Rio Tinto Alcan Inc. ("Rio Tinto"). The permit authorizes Rio Tinto to discharge effluent, waste, and emissions from an aluminium smelter in Kitimat, BC. Rio Tinto sought the permit amendment in support of a project designed to modernize and increase the production at the Kitimat smelter. The project will reduce the smelter's emissions of polycyclic aromatic hydrocarbons, fluorides, and particulate matter, but will result in an increase in sulphur dioxide emissions. Among other things, the amendment allows an increase in the smelter's total emissions of sulphur dioxide. The previous sulphur dioxide limit was a maximum of 27 Mg/d (tonnes per day), and the new limit is a maximum of 42 tonnes per day.

Among other things, the Appellants alleged that the Director erred in his assessment of the potential impacts of the increase in sulphur dioxide emissions, and in assessing sulphur dioxide treatment options. The Appellants requested that the Board "strike" the clause allowing the increase in sulphur dioxide emissions, and amend the Permit to require the installation of sulphur dioxide scrubbers.

Shortly after the appeals were filed, Rio Tinto requested that the Board dismiss the appeals on the basis that none of the Appellants are a "person aggrieved" by the permit amendment within the meaning of the *Environmental Management Act* (the "*Act*"). Section 100(1) of the *Act* states that a "person aggrieved by a decision" of the Director may appeal the decision to the Board. The Board requested written submissions on this issue from all parties.

In determining whether an Appellant is a "person aggrieved," the Board applies the test set out in *Attorney General of the Gambia v. N'Jie*, [1961] 2 ALL E.R. 504 (P.C.). That test has been applied by the Board in numerous cases, and it requires each Appellant to disclose sufficient information to allow the Board to reasonably conclude that the permit amendment will or may prejudicially affect the Appellant's interests. Six of the Appellants (Lynda Gagne, Emily Toews, Charles Henry Claus, Elisabeth Stannus, the Trust, and the Society) argued that this legal test should be revisited and broadened, based on recent judicial decisions on public interest standing. They also described how each of them is interested in, or may affected by, the permit amendment. One of the Appellants, Pamela Vollrath, provided no submissions.

First, the Board considered whether it should revise the legal test that it applies to determine whether an appellant is a "person aggrieved" under section 100(1) of the *Act*. The Board found that court decisions regarding public interest standing in court proceedings are irrelevant to determining whether a person has a statutory right of appeal to the Board. In deciding whether an appellant has standing to appeal, the Board must consider the language in the relevant statute, which is section 100 of the *Act* in this case. Based on the modern approach to statutory interpretation, the phrase "person aggrieved" is to be read in its grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature. Also, "person aggrieved" should be interpreted in a

broad, liberal and purposive manner that is consistent with the Legislature's intention and section 8 of the *Interpretation Act*. The Board considered several dictionary definitions of "aggrieved," and found that a person who is "aggrieved" by a decision is a person whose rights or interests are, or may be, harmed, injured or adversely effected by that decision. The Board also found that section 100 of the *Act* contains no indication that the Legislative intended for "person aggrieved" to include persons who have a "genuine interest" in the appealed decision. If an appellant only needed to establish that they have a "genuine interest" in the appealed decision, it would give no effect to the word "aggrieved," because a person may have a genuine interest in a decision without suffering a genuine grievance or harm as a result of the decision. Furthermore, persons with a "genuine interest" in an existing appeal may apply for participant status in the appeal, pursuant to section 94(1)(a) of the *Environmental Management Act*. For all of those reasons, the Board rejected the Appellants' submission that it should revise the test for determining whether an appellant is a "person aggrieved" within the meaning of section 100 of the *Act*.

Next, the Board considered whether each of the Appellants met the test for standing to appeal as a "person aggrieved" by the permit amendment. The Board found that Ms. Toews established that she may be adversely affected by the amendment, given her existing asthma and sensitivity to pollutants, her physically active lifestyle, and the fact that she resides and works in Kitimat where the air quality will be most affected by the increased sulphur dioxide emissions. Similarly, the Board found that Ms. Stannus' home and workplace are within the area that will be most affected by the increase in sulphur dioxide emissions, and she spends a significant amount of time outdoors walking, gardening, and participating in recreation within the most affected area. The Board concluded that the increase in sulphur dioxide emissions may adversely affect Ms. Stannus' health, and/or her enjoyment of her home and outdoor activities.

However, the Board found that the remaining Appellants' concerns about the potential effects of the emissions on their interests were too general, speculative and/or remote to establish that they are "persons aggrieved" by the amendment.

In summary, the Board found that Ms. Toews and Ms. Stannus were "persons aggrieved" by the amendment, and therefore, Rio Tinto's application to dismiss their appeals was denied. However, given that Ms. Gagne, Mr. Claus, Ms. Vollrath, the Trust, and the Society failed to establish that they were persons aggrieved" by the amendment, Rio Tinto's application to dismiss those appeals for lack of jurisdiction was granted.

Accordingly, the application to dismiss the appeals was granted, in part.

This decision was subsequently judicially reviewed by the British Columbia Supreme Court. See pages 52 and 53 of this report for a summary of the court's ruling.

## An Extraordinary Remedy – the Power to Order a Stay

An appeal to the Board does not automatically prevent the decision under appeal from taking effect. The decision under appeal remains valid and enforceable unless the Board makes an order to temporarily "stay" the decision. A temporary stay prevents the decision from taking effect until the appeal is decided.

If a party wants to postpone the decision from taking effect until after the appeal is decided, the party must apply to the Board for a stay and address the following issues:

- whether the appeal raises a serious issue to be decided by the Board;

- whether the applicant for the stay will suffer irreparable harm if a stay is not granted; and
- whether there will be any negative consequences to property (real or economic), the environment or to public health or safety if the decision is stayed until the appeal is concluded (the balance of convenience test).

When addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" (i.e., it could not be remedied if the party ultimately wins the appeal). "Irreparable" has been defined by the Supreme Court of Canada as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision..., where one party will suffer permanent market loss or irrevocable damage to its business reputation..., or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

In addressing the issue of "balance of convenience," the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties or the environment if the stay is granted. In the following appeal under the *Water Act*, the Board found that a stay should not be granted as it was unlikely that the Appellant's aboriginal rights would be irreparably harmed.

## Stay denied in a case involving Aboriginal rights and a community's water supply

2014-WAT-008(a) Chief Michelle Edwards in her own right and on behalf of the Sekw'el'was (a.k.a. Cayoose Creek Indian Band) v. Assistant Regional Water Manager (District of Lillooet, and Tribal Chief Shelley Leech in her own right and on behalf of the T'it'q'et (a.k.a. Lillooet Indian Band), Third Parties)

**Decision Date:** March 6, 2014

**Panel:** Alan Andison

Chief Michelle Edwards, in her own right and on behalf of the Sekw'el'was (the "Applicants"), applied for a stay of a conditional water licence that was issued to the District of Lillooet (the "District") by the Water Manager. The District applied for the licence after experiencing issues with water quality and water shortages. The licence allows the District to construct a new water intake system, and divert up to 2 million gallons of water per day from the Seton River, at a location that is within St'at'imc Territory. The Applicants are part of the St'at'imc Nation. The Applicants' reserve land is located across the river from the new water intake.

The Applicants appealed the licence on the basis that the Provincial Crown has a duty to consult with them in relation to the licence, but the Crown failed to adequately consult in this case. The Applicants submitted that the project authorized under the licence will directly and adversely affect their Aboriginal title, rights and interests.

When the Applicants filed their appeal, they applied for both an immediate interim stay, and a stay pending the Board's decision on the merits of the appeal. The Applicants sought an immediate interim stay, before the Board decided the merits of the stay application, because some of the water works authorized by the licence were already under

construction when the appeal was filed. The Board issued an interim stay, preventing further work from occurring within the Seton River and Seton River bed, until the Board was able to consider all parties' submissions on the merits of the stay application.

Regarding the merits of the stay application, the Applicants submitted that the physical works will be located within fish-bearing and spawning habitat, and that the Applicants rely upon the fish in the exercise of their Aboriginal rights and title. The Applicants further submitted that it is foreseeable that water removal may result in river warming, which may contribute to the death of fish. The Applicants also submitted that the physical works may cause significant erosion to their reserve lands.

The District opposed the application for a stay. The District submitted that the Province fulfilled its duty to consult with the Applicants by providing written notice to Tribal and Chiefs Councils, of which the Applicants are members. The District also submitted that the licensed works were unlikely to cause irreparable harm. The District referred to concurring expert reports which concluded that the project is unlikely to impact fish and fish habitat. In addition, the District noted that it previously held a water licence between 1975 and 1996 (the "1975 licence"), which allowed it to divert the same amount of water (i.e., 2 million gallons per day) from the Seton River as the present licence. The District submitted that any adverse effects of the proposed intake would have been evident during the operation of the 1975 licence, and there were none. Finally, the District argued that the licence was necessary because the current water supply was inadequate in both quality and quantity.

In determining whether the stay ought to be granted, the Board applied the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*. With respect to the first stage of the test, the Board found that the appeal clearly raised serious issues which are not frivolous, vexatious, or pure questions of law. Those issues included concerns about potential harm to Aboriginal rights, and the level of consultation that was appropriate in the circumstances. The Board found that the first stage of the test was satisfied, and proceeded to consider the subsequent parts of the test.

Regarding the second part of the test, the Board found that there was unlikely to be irreparable harm to the Applicants' asserted Aboriginal rights if the intake was constructed. In particular, the Board found that there was no reliable evidence that the intake would adversely affect fish or fish habitat such that the Applicant's rights would be impacted. The Board accepted the findings of two concurring expert reports which concluded that there is a low likelihood that the subject area is used for fish spawning, and that any loss to fish or fish habitat will be temporary – not permanent. The Board noted that the project is planned to occur after spawning, and that the reports describe mitigation strategies to reduce impact on fish and aquatic habitat, and to control sediment and erosion. Further, the Board noted that an environmental monitor would be onsite. The Board also noted that water flow in the river is regulated by an upstream dam. Further, the Board noted that the 1975 licence permitted the same amount of water to be diverted for 20 years, and the 1975 licence may have continued to the present day were it not for damage to the original works. With respect to concerns that fish would be caught in the intake, the Board noted that the intake design includes a fish screen. The Board found that there was no detailed discussion of the likelihood of erosion, but if erosion were to occur, it would qualify as compensable harm rather than irreparable harm. For all of those reasons, the Board found that the Applicants would not suffer irreparable harm if a stay was denied.

Turning to the third part of the test, the Board weighed the potential harm to the Applicants' interests, if a stay was denied, against any potential

harm to the District's interests if a stay was granted. The Board found that the balance of convenience favoured denying a stay. The Board found that there would be no irreparable harm to the Applicants' interests in fish or fish habitat, and any failure to adequately consult the Applicants was not irreparable harm in itself. Concerning potential harm to the District's interests, if a stay was granted, there was undisputed evidence that the District's existing water sources did not comply with recently developed water quality guidelines and treatment levels. The Board found that a delay in exercising the rights under the licence may potentially harm the District's finances, and potentially impact the District's ability to supply safe drinking water and sufficient water for firefighting. The Board concluded that, given the environmental precautions taken in constructing the works, the public interest in access to a safe and sufficient supply of water tipped the balance of convenience against granting a stay of the licence, pending a final decision on the appeal.

Accordingly, the interim stay was rescinded, and the stay application was denied.

# Final Decisions

## *Environmental Management Act/ Waste Management Act*

### Property owners dispute whether contamination that migrated from one property to a neighbouring property was adequately remediated

2012-EMA-002(b) Burquitlam Building Limited and Morguard Real Estate Investment Trust v. Director, *Environmental Management Act* (Canada Safeway Ltd., Third Party)

**Decision Date:** July 17, 2013

**Panel:** Alan Andison, Robert Cameron, Monica Danon-Schaffer

Burquitlam Building Limited and Morguard Real Estate Investment Trust (collectively, "Morguard") own a parcel of land adjacent to another parcel owned by Canada Safeway Ltd. ("Safeway"), in Coquitlam, BC. Part of Morguard's land (the "Morguard Site") and part of Safeway's land (the "Management Area") were contaminated with tetrachloroethylene, also known as perchloroethylene ("PCE"), from a dry cleaning operation previously located on Morguard's land. The contamination was discovered in or around 1999.

Morguard chose to conduct voluntary remediation on the Morguard Site and the Management Area under section 54 of the *Environmental Management Act* ("Act"). The remediation involved a combination of soil removal and in-situ chemical oxidation, in accordance with an approval in principle granted by the Ministry of Environment (the "Ministry"). The remediation was

conducted between 2005 and 2008 by Morguard's environmental consultant, AECOM Canada Ltd. ("AECOM"). The remediation addressed two vertical depth units: Zone A – to a depth of approximately 11 metres below the ground surface; and, Zone B – consisting of soils and a deep aquifer from 11 metres to approximately 30 metres below the ground surface. Based on investigations, AECOM determined that a low permeability confining layer consisting of silt and clay was directly below Zone B. AECOM believed that the silt and clay layer would protect the underlying geological unit (Zone C), and therefore, no testing of Zone C was performed.

After remediation, AECOM took 47 soil samples from Zone A, 26 soil samples from Zone B, three groundwater samples from Zone A, one groundwater sample from Zone B, and installed soil vapour probes on the Morguard Site and the Management Area. The soil, groundwater, and soil vapour samples revealed only one marginal exceedance of the standards set out in the *Contaminated Sites Regulation* (the "*Regulation*"): the groundwater sample in Zone B. Additional chemical treatment was applied to the groundwater at that location. By July 2010, Morguard confirmed that the groundwater contained no exceedances.

Meanwhile, in October 2009, Morguard applied to the Director for a single certificate of compliance for the Morguard Site and the Management Area. Morguard sought a certificate of compliance confirming that the PCE in the soil, groundwater, and soil vapours on the Morguard Site and the Management Area had been remediated to the applicable numeric standards set out in the *Regulation*. In August 2010 and January 2011, Morguard submitted an amended Confirmation of Remediation Report and addendums to the Director regarding the groundwater and soil vapours in the Management Area, in order to comply with changes to the Ministry's soil vapour guidelines that came into force after Morguard submitted its initial application for a certificate of compliance.

In January 2011, the Director commenced her review of Morguard's application using an external reviewer, GeoEnviroLogic Consulting Ltd. ("GCL").

In February 2011, Safeway notified the Director and Morguard that it planned to construct an underground parkade on its property. Safeway's development plans prompted Morguard to re-evaluate soil vapours, and in May 2011, Morguard submitted soil vapour risk assessment information to the Director.

In May 2011, the Ministry's external reviewer, GCL, encouraged Morguard to divide its certificate of compliance application into two separate applications: one for the Morguard Site seeking confirmation that it was remediated in accordance with the numerical standards in the *Regulation*; and, another for the Management Area confirming that it was remediated in accordance with the risk-based standards in the *Regulation*. Morguard agreed.

In June 2011, GCL completed its review of Morguard's reports and documents, and concluded that the reviewed material was "in satisfactory compliance" with the requirements of the *Act* and the *Hazardous Waste Regulation*. In July 2011, the Director sent a copy of a draft certificate of compliance to Morguard for the Morguard Site, and a copy of a draft certificate of compliance for the Management Area to Safeway, for comment.

In August 2011, Safeway advised the Director that it objected to the issuance of the certificates of compliance. Safeway's environmental consultant, NEXT Environmental Inc. ("NEXT"), had discovered PCE contamination in excess of certain regulatory standards outside of, and down gradient from, the Management Area. NEXT believed that dissolved PCE contamination persisted on, and continued to migrate onto, Safeway's property from Morguard's property.

Based primarily on the information from NEXT, the Director refused to issue the certificates of compliance. The Director concluded that Morguard's application was incomplete and contained errors. Among other things, the Director concluded that Morguard had not provided a detailed site investigation report for the Management Area as required by sections 49(2) and 59 of the *Regulation*.

Morguard appealed the Director's decision to the Board. The main issues in the appeal were the extent to which the PCE contamination had migrated from Morguard's land to Safeway's land, the depth of the contamination, and whether Morguard's remediation met the applicable requirements of the *Act* and the *Regulation*, such that certificates of compliance should be issued. Morguard also raised issues regarding whether the Director's decision-making process was fair, and whether the Director provided adequate reasons for her decision. In addition, Morguard submitted that the burden of proof in the appeal should be reversed, such that the Director should be required to justify her decision, rather than the burden being on Morguard, as the Appellant, to prove its case. Morguard requested that the Board order the Director to issue the certificates, or alternatively, identify the deficiencies in Morguard's applications and provide Morguard with an opportunity to remedy those deficiencies before rejecting its applications.

The Board found that the general rule that an appellant has the burden of proving the facts on which it relies, should only be reversed in exceptional circumstances, such as when the appealed decision is so lacking in reasons that the Appellant is unable to prepare its case. The Board found that the Director's written reasons for her decision disclosed sufficient information for Morguard to prepare its case, which it had done. Therefore, there was no reason to reverse the onus of proof in this case.

Next, the Board considered whether the Director breached the rules of procedural fairness in reaching her decision. The Board found there was no evidence that the Director was biased. The Board also found that the Director provided adequate written reasons for her decision. Moreover, the Board held that the appeal was conducted as a new hearing of the matter, involving new evidence that was not before the Director, which would allow the Board to decide whether to issue the certificates.

The Board also considered whether Morguard had complied with a "requirement imposed by the director" in accordance with section 53(3)(a)(iv) of the *Act*. Specifically, the Director submitted that one of her reasons for refusing Morguard's application was that Morguard had not fully complied with a requirement to determine the full extent of the contamination. The Director asserted that she had imposed this requirement in a November 2004 letter to Morguard which stated that "the ministry expects you to advise affected persons... of the contamination, determine the full extent of the contamination and prepare and implement a remediation plan." The Board found that the statements in the letter did not constitute a legally enforceable "requirement imposed by the director" within the meaning of section 53(3)(a)(iv) of the *Act*, as the letter stated that it was an "expectation" only. The Board held that the imposition of a requirement under the *Act* is a serious matter that should be stated in the clearest possible terms, and in this case, the Director did not make it clear that she was imposing a mandatory requirement under a statutory authority.

Additionally, the Board considered whether Morguard had provided a detailed site investigation report, and whether it was required to do so under sections 49(2) and 59 of the *Regulation*. The Director acknowledged that she did not order Morguard to complete a detailed site investigation report, but she argued that an order to complete such a report was unnecessary based on the definition of "detailed site investigation" in section 39 of the *Act*. Given that

section 41 of the *Act* states that a director "may order" a detailed site investigation report, the Board concluded the requirement in section 49(2) of the *Regulation* to provide a detailed site investigation report does not apply unless a director has ordered the person to complete such a report. In addition, based on the language in section 59 of the *Regulation*, the Board concluded that a detailed site investigation report is not required to be in the form of a single clearly-labelled document, although this may be preferable. In the present case, the Director did not order Morguard to submit a detailed site investigation report, and therefore, such a report was not required under section 49(2) of the *Regulation*. Even if a report had been required, the Board concluded that the information submitted by Morguard fulfilled the requirements of section 59 for a detailed site investigation report, although the information was not in the form of a single clearly-labelled report. However, the Board noted that, although a detailed site investigation report was not required, Morguard still had to fully identify the areas, depths and degrees of contamination, as the Director has the statutory authority to refuse an application for a certificate of compliance if insufficient information is provided, under sections 53(3) and 56 of the Act.

The Board then considered the relevance of the NEXT data, and whether it provided a basis to refuse Morguard's applications. Safeway relied on the exceedances detected by NEXT on Safeways' property as an indication of possible PCE contamination above the applicable numerical standards, in Zones B and C of the Morguard Site and the Management Area. Safeway argued that Morguard did not sample deeply enough to determine whether PCE contamination remained in those areas. Similarly, the Director submitted that NEXT's data suggested that Morguard's investigations did not fully delineate the extent of the contamination, and that the groundwater remained contaminated above the applicable standards on Safeway's property near the Management Area.

The Board considered the data and expert opinion evidence provided by all of the parties. The Board noted that, although Morguard did not drill into Zone C for sampling, the experts generally agreed that drilling is not an effective way to detect a dissolved non-aqueous phase liquid such as PCE, due to the unpredictable nature of the migration of such substances, which are heavier than water and do not necessarily spread in the same direction as the flow of groundwater. Although a PCE exceedance was detected in one groundwater sample in Zone B before the remediation was complete, the Board found that the PCE concentration in that sample was still relatively low, and the samples at that location following the remediation were well below the applicable standard. The Board also found that the low permeability silt/clay layer at the bottom of Zone B on the Morguard Site and the Management Area would have prevented PCE from migrating into Zone C at those locations, and that PCE must have migrated into Zone C due to a break in the low permeability layer on Safeway's property outside of the Management Area. Further, the Board found that the PCE contamination likely migrated to Safeway's property over several decades, and was likely present before Morguard conducted remediation. The Board concluded, therefore, that the exceedances found on Safeway's property did not indicate ongoing contamination on the Morguard Site or the Management Area, ongoing migration from those areas, or that the remediation of those areas was inadequate. The Board also concluded that, although further sampling by Morguard may have been prudent, it was not required and would have been extremely expensive, and the expense of further sampling is a relevant consideration under section 56(1)(c) of the Act, which provides guidance to persons conducting remediation and to a director when considering applications for certificates of compliance.

Finally, the Board considered whether a certificate of compliance should be issued for the Morguard Site and/or the Management Area. The Board noted that section 53(6) of the Act provides a director with the discretion to issue a certificate for part of a site. The Board found that, although PCE contamination had migrated from Morguard's property to Safeway's property in the past, the contamination remaining on Safeway's property outside of the Management Area may be the subject of a separate application for a certificate of compliance. The Board concluded that Morguard had determined the depth and extent of the contamination, and had remediated the Morguard Site to the applicable numerical standards. The Board also concluded that the Management Area was remediated to risk-based standards. Consequently, the Board sent the matter back to the Director with directions to issue certificates of compliance for the Morguard Site and the Management Area.

Accordingly, the appeal was allowed.

## Parties negotiate a consent order to resolve an appeal

2013-EMA-013 Park Oakview Holdings Ltd. v. Director, *Environmental Management Act* (Shell Canada Limited, Third Party)

**Decision Date:** February 19, 2014

**Panel:** Alan Andison

Park Oakview Holdings Ltd. (the "Appellant") appealed a certificate of compliance issued in May 2013, by a delegate of the Director. The certificate of compliance provided that the Shell Canada Limited ("Shell") had satisfactorily remediated petroleum hydrocarbon contamination which had migrated from a Shell service station into the soil of neighbouring property owned by the Appellant. The certificate of compliance also imposed risk management conditions upon future use of the remediated property.

In its Notice of Appeal, the Appellant submitted that the Director had breached her duty of procedural fairness by issuing the certificate without adequately consulting the Appellant, and by failing to provide the Appellant with a draft of the certificate of compliance for review and comment prior to issuing the certificate. Further, the Appellant alleged that the risk management conditions included in the certificate of compliance imposed an unreasonable burden on the Appellant. The Appellant requested that the Board vary the certificate of compliance, such that Shell would be responsible for complying with the conditions and would indemnify the Appellant against loss, damages and costs arising from the contamination. In the alternative, the Appellant requested that the Board order the Director to consult the Appellant about Shell's remediation and future management of the contamination that had remained on the property.

Before the appeal was heard by the Board, the Appellant, with the consent of all other parties, requested that the appeal be held in abeyance for three months, to allow the parties to negotiate a resolution to the appeal. Through those discussions, the parties negotiated an agreement to settle the appeal. With the parties' consent, the Board rescinded the certificate of compliance, ordered the Director to re-consider Shell's application for a certificate of compliance, and dismissed the other forms of relief sought by the Appellant, without costs awarded to any party.

Accordingly, the appeal was allowed in part, by consent.

## Appeals involving contamination at a former gas station raise Constitutional issues

1998-WAS-018(c) and 1998-WAS-031(a) Halme's Auto Service Ltd. and Petro Canada Limited (now known as Suncor Energy Inc.) v. Regional Waste Manager (Chardale Enterprises Ltd., Attorney General of BC, Third Parties)

**Decision Date:** March 24, 2014

**Panel:** Alan Andison

Background

This decision addressed several appeals by present or former owners and/or operators of a gasoline station located on a parcel of land (the "Site") in Chemainus, BC, where portions of the soil and groundwater were contaminated with petroleum products. The appeals were against two separate decisions issued by the Regional Manager in 1998: (1) an order to remediate the contamination (the "Order"); and, (2) a determination that one company was a minor contributor to the contamination (the "Determination"). The appeals were held in abeyance for many years, while remediation efforts occurred and the parties attempted to resolve the appeals. Ultimately, only part of the contamination was remediated, and the parties were unable to resolve the appeals. In 2013, at the Appellants' request, the Board heard the appeals together by way of written submissions.

A retail gasoline station operated at the Site from approximately 1954 to 2004. In or about 1958, two underground storage tanks were installed at the Site. Gasoline was stored in the tanks and sold to retail customers. From the mid-1950s to May 2004, corporate predecessors of Petro Canada Limited ("Petro Canada"), now known as Suncor Energy Inc. ("Suncor"), delivered the gasoline that was stored and sold at the Site.

Halme's Auto Service Ltd. ("Halme's") operated the gasoline station from 1964 to 1993, and owned the Site from May 1979 to early 1993. During that time, corporate predecessors of Halme's and Suncor were parties to various lease and sublease agreements. From 1972 to 1994, Suncor's predecessors had a Retailer Dealer Sales Agreement with Halme's, which provided that the gasoline did not become the property of Halme's until it passed through the pumps immediately before sale to a retail customer. In 1993, Halme's sold the Site and business thereon to Chardale Enterprises Ltd. ("Chardale"), and assigned the lease and sub-lease agreements to Chardale. Chardale owned the Site when the appeals were heard.

In March 1980, a leak from one of the underground storage tanks was discovered. Suncor's predecessors arranged to replace the two existing underground tanks, and Halme's agreed to pay for the new tanks. It was disputed whether, or to what degree, any gasoline contamination and/or contaminated soil was removed or remediated when the tanks were replaced. In 1989, a third underground storage tank was installed at the Site.

In 1995, Chardale hired EBA Engineering Consultants Ltd. ("EBA") to conduct an environmental assessment at the Site. EBA took soil samples, which showed gasoline contamination above statutory standards. EBA concluded that there was "significant weathered gasoline contamination of the subsoils of the tank nest."

In April 1996, the three existing underground storage tanks and associated distribution lines were removed, and new tanks were installed in a new tank nest location on the Site. At that time, Chardale retained Seacor Environmental Engineering Ltd. ("Seacor") to conduct investigations and environmental monitoring at the Site. Seacor observed that the removed storage tanks were in "good condition" but the "distribution piping was

heavily rusted and pitted." Soil and groundwater samples taken by Seacor near the former tank nest and at other locations on the Site contained gasoline contamination that exceeded the statutory standards.

In December 1996, Chardale leased the Site to a company later known as Chemainus Fuels. Under that lease agreement, Chardale agreed to remediate the Site. However, Chardale did not do so. In August 1998, Chemainus Fuels obtained a court order that allowed it to undertake remediation and set-off all reasonable remediation costs against monies payable to Chardale under the lease.

Meanwhile, in or about September 1997, at Chardale's request, the Regional Manager appointed an allocation panel (the "Allocation Panel") to determine whether Chardale should be granted minor contributor status. The Allocation Panel concluded that Chardale was a "responsible person" under the Act, but was a "minor contributor" to the contamination, and was responsible for only 4.5% of the costs of remediating the Site.

In June 1998, the Regional Manager issued the Order to Halme's, Petro Canada, and Chardale. The Order required them to remediate the Site, but did not specify who contributed most substantially to the Site becoming a contaminated site, nor did it allocate the remediation costs among the named persons. Upon completion of the remediation, the Order required the named persons to obtain a certificate of compliance. A few months later, in October 1998, the Regional Manager issued the Determination, in which he determined that Chardale was a minor contributor to the contamination at the Site, and he limited Chardale's liability for the cost of remediating the Site to 4.5% of the total remediation costs. In the Determination, the Regional Manager adopted the opinion of the Allocation Panel.

Halme's and Petro Canada filed separate appeals against the Order and the Determination.

In November 1998, Chemainus Fuels retained Levelton Engineering Ltd. ("Levelton") to develop a remediation plan for the Site. The remediation plan received an approval in principle from the Regional Manager, and Levelton commenced remediating the Site. The appeals were held in abeyance while remediation efforts took place.

In May 2004, Levelton issued a site investigation report, which concluded that approximately 700m$^3$ of contaminated soil remained below a building on the Site, and could not be excavated without removing the building. Levelton also identified a plume of contaminated groundwater associated with the contaminated soil. The contaminated groundwater was found to be migrating off-site to an adjacent property where a residential building is located.

In early 2013, the appeals were reactivated at the Appellants' request. In May 2013, the Board was advised that Chemainus Fuels had been dissolved in late 2012 or early 2013.

### The Board's Findings

The appeals raised three primary issues, as follows.

> **Issue 1:** Whether the Order should be reversed or varied such that Halme's and/or Petro Canada (now Suncor) should be removed from the Order.

The Board found that the Regional Manager properly exercised his discretion in issuing the Order, there continued to be a need for the Order because the remaining contamination at the Site posed a risk to human health and the environment, and the three corporations named in the Order should remain named in the Order. In making those findings, the Board considered four sub-issues.

First, the Board considered whether Halme's or Petro Canada/Suncor should be removed from the Order. Halme's argued that Petro Canada/Suncor contributed most substantially to the contamination,

and therefore, only Petro Canada/Suncor should be named in the Order. Conversely, Petro Canada/Suncor argued that Halme's contributed most substantially, and therefore, only Halme's should be named in the Order. Based on the evidence, the Board found that both Appellants contributed most substantially to the Site becoming contaminated. The Board also found that even if only one of them contributed most substantially, it would be appropriate to name both of them in the Order. Second, the Board considered whether the Regional Manager failed to take into account private agreements respecting remediation, including the leases, subleases, and Retailer Dealer Sales Agreement. The Board found that the Regional Manager had considered the relevant private agreements. Further, the Board found that even if the private agreements absolved one party from liability for remediation costs, the agreements could be ignored when naming persons in the Order to ensure remediation of the Site, because a party could rely on the agreements to seek recovery of their remediation costs after remediation was completed. Third, the Board considered whether the Order contained inadequate reasons or was unworkably vague. The Board found that the Order contained adequate reasons to understand the basis of the Regional Manager's decision, and was clear enough that the named persons could understand what they were ordered to do. Fourth, the Board considered whether the Regional Manager lacked the jurisdiction to require, that the named persons must seek a certificate of compliance once remediation is complete. The Board found that the power to require the persons named in a remediation order to apply for a certificate of compliance is within the Regional Manager's jurisdiction. Accordingly, the Order was confirmed.

**Issue 2:** Whether the Determination is invalid because section 27.3(3) of the *Waste Management Act* (the "Act") (now section 50(3) of the *Environmental Management Act*) encroaches on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*, and therefore, is invalid and of no force or effect as it is beyond the legislative power of the Province.

In deciding the issue, the Board applied the test set out in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 [*Re Residential Tenancies Act*], which involved three questions:

1. Does the power conferred under section 27.3 "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation?
2. If so, is the power conferred under section 27.3 of the *Act* a judicial power?
3. If so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?

Concerning the first question, the Board found that a determination of minor contributor status under section 27.3 of the *Act* broadly conforms to the superior courts' jurisdiction at the time of Confederation to decide disputes involving liability and/or the allocation of liability amongst multiple private parties for damage to land caused by the discharge of harmful substances. On the second question, the Board found that the powers and role of a Regional Manager in making a minor contributor determination are adjudicative or judicial in nature. On the third question, the Board found that the Regional Manager's power to make a minor contributor determination is not a prerequisite for, and is not necessarily incidental to, the timely remediation of contaminated sites. Consequently, based on the *Re Residential Tenancies Act* test, the Board found that the power conferred on the Regional Manager under section 27.3 is constitutionally invalid. This finding was reinforced by the Board's finding that section 27.3 also breaches the principle of judicial independence as set out in additional case law.

Although the Board found section 27.3 to be constitutionally invalid, the Board determined that it has no authority to declare legislation to be invalid. Rather, the Board may read the Act without the inclusion of section 27.3. Consequently, the Board concluded that the Regional Manager had no statutory authority to make the Determination. Accordingly, the Determination was found to be void.

> **Issue 3:** If section 27.3(3) of the Act is valid on a constitutional basis, whether the Determination should be reversed based on errors by the Regional Manager, or changed circumstances after the Determination was issued.

Given the Board's findings under Issue 2, it was unnecessary to decide Issue 3. However, the Board provided findings on Issue 3 in the event that it was wrong on Issue 2. The Board found that even if section 27.3(3) is valid on a constitutional basis, the Determination should be reversed because it was based on certain findings by the Allocation Panel that were inconsistent with the findings in the Seacor Report and the Levelton Report, and the Allocation Panel's formula for assessing the parties' shares of the remediation cost was based on time-sensitive factors which had since changed.

Conclusion

Accordingly, the appeals of the Order were dismissed, and the appeals of the Determination were allowed.

## *Greenhouse Gas Reduction (Cap and Trade) Act*

There were no decisions by the Board during this reporting period.

## *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*

There were no decisions by the Board during this reporting period.

## *Integrated Pest Management Act*

There were no decisions by the Board during this reporting period.

## *Water Act*

### RV Park Operator seeks to add fill to an adjacent lake front

2012-WAT-014(a) 0805626 BC Ltd. v. Assistant Regional Water Manager

**Decision Date:** April 16, 2013

**Panel:** James Mattison

0805626 BC Ltd. (the "Company") appealed a decision of the Assistant Regional Water Manager (the "Water Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The Water Manager refused the Company's application for an approval to make changes in and about a stream.

Specifically, the Company requested an approval to place fill on part of the Company's property adjacent to Dragon Lake, near Quesnel BC. The Company sought to add the fill to protect the property from flooding. A recreational vehicle park is operated on the property.

A previous owner of the property placed fill along the edge of the property adjacent to the Lake. In 1994, the Ministry ordered the previous owner to cease adding fill, and to obtain a survey of the property boundaries.

In 1999, after the site was surveyed, the natural boundary of Dragon Lake was adjusted, and the property line was established along the southern portion of the property. The property line was also realigned to reflect the natural boundary of Dragon Lake on the east side of the property. As a result of the survey, "new" land was recorded between the revised natural boundary of the Lake and the property. This new land was registered as a separate parcel, and is the area on which the previous owner placed most of the fill.

By a Crown Grant issued in December 1999, the previous owner purchased the new land. As a condition of the Crown Grant, the new land was consolidated with the pre-existing property, which was largely unfilled, to form the subject property. The Crown Grant also required that "... the Grantee shall not construct, erect or maintain any improvements on the land within 7.5 metres of the natural boundary of Dragon Lake... ."

In 2008, after the Company purchased the property, more fill was added along the side the property, adjacent to the Lake.

In the Fall of 2008, the Ministry requested that the Company stop the filling, to allow a habitat assessment. On the completion of this assessment, the Company was directed to remove the fill. No further filling was done at that time, but the fill was not removed.

In September 2011, the Company applied for an approval under the *Water Act* to make changes in and about a stream by placing more fill on the property adjacent to Dragon Lake, and seeding the area with grass. Approximately 2500 square metres of area was proposed to be disturbed. The application was referred to interested agencies for comment, including the Ministry's Habitat Management section. Following a site visit, a Habitat Biologist with the Ministry recommended that the area not be filled.

In June 2012, the Water Manager refused the Company's application on the basis that the area to be filled is part of Dragon Lake, and the Habitat Biologist recommended that the area should not be filled.

The Company appealed to the Board on the basis that the Water Manager's decision was based on several errors. The Company submitted that the portion of the property to be filled was sold by the Crown in 1999, and at that time, was determined to be land and not part of the Lake. The Company also submitted that the area to be filled is above the Lake's high water mark, and therefore, is not in a "stream" as defined in the *Water Act*. In addition, the Company submitted that the Lake's water level is controlled by the City of Quesnel, and the Habitat Biologist visited the site when the property was flooded as a result of the City not releasing enough water from the Lake.

The Board first considered whether the placement of fill on a part of the property that is more than 7.5 metres inland from the natural boundary of Dragon Lake fits within the definition of "changes in and about a stream" and, therefore, requires an approval under the *Water Act*. The Board found that the southern portion of the subject area is directly connected to the Lake and, therefore, is "in and about a stream." The Board found that the eastern portion of the subject area is not in the Lake, but is close to the Lake and may be a "swamp." Based on evidence of the area's characteristics, the Board found that at least some of the eastern area is a swamp, and therefore, requires an approval under the *Water Act*.

Next, the Board considered whether an approval should be granted in this case. The Board found that it is important to protect the quality of the water in Dragon Lake, and that swamps and areas around the shoreline help to maintain water quality. Based on evidence of the subject area's characteristics, the Board confirmed the Water Manager's decision to deny the approval in respect of the southern portion of the subject area. However, in respect of the eastern portion of the subject area, the Board found that it had insufficient evidence about the extent and location of the swamp, and how filling that area may affect water quality, fish and fish habitat, to decide whether an approval should be issued. Consequently, the Board sent the matter back to the Water Manager to reconsider the eastern portion of the subject area, with directions to seek further information about the extent and location of the swamp, and how filling that area may affect water quality, fish and fish habitat.

Accordingly, the appeal was allowed, in part.

## Insufficient water in Irish Spring to justify an additional licence

2012-WAT-033(a) Carolyn Hopp (nee Lawrence) v. Assistant Regional Water Manager (Jiri Cizinsky and Nada Cizinska, Third Parties)

**Decision Date:** May 22, 2013

**Panel:** Blair Lockhart

Caroline Hopp appealed a decision of the Assistant Regional Water Manager (the "Water Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), refusing to issue a water licence to Ms. Hopp.

Irish Spring is a small water source located on a parcel of land ("Lot 12") near Bralorne, BC. Lot 12 which is owned by the Third Parties, who also hold a water licence on Irish Spring. Ms. Hopp owns land ("Lot 9") across the road from Lot 12.

In 2008, Ms. Hopp applied for a licence to divert 500 gallons of water per day from Irish Spring for domestic purposes. In her licence application, she indicated that although the proposed water diversion works would have to be located on Lot 12, the Third Parties did not consent to having the works on their property. She advised the Ministry that the flow of water from Irish Spring was estimated in November 2008 to be 1,458 gallons per day.

In 2008, Ms. Hopp also applied for a licence to divert and use 500 gallons of water per day from Ogden Spring, located adjacent to the northern boundary of Lot 12. That licence was issued in late 2009.

In March 2009, Ms. Hopp notified the Third Parties of her application for a water licence on Irish Spring. Subsequently, the Third Parties notified the Ministry that they objected to the proposed licence.

In September 2010, and again in September 2012, Ministry staff visited Irish Spring to determine the rate of water flow from the Spring. The 2010 estimate was 130 gallons per day, and the 2012 estimate was 100 gallons per day.

In September 2012, the Water Manager refused to issue the licence on Irish Spring, on the basis that the Spring is fully recorded under the existing licence to the Third Parties and there is insufficient water to enable a new licence to be issued.

Ms. Hopp appealed to the Board on the basis that there is sufficient water flow to support a new licence, and the Third Parties' existing licence on Irish Spring is not being beneficially used and should be cancelled pursuant to section 23 of the *Water Act*. Ms. Hopp also submitted that 200 gallons of water per day from Irish Spring would be sufficient to meet her needs, as her other licence provides sufficient water to meet her needs except during especially dry years.

The Water Manager submitted that his decision should be confirmed.

The Third Parties agreed with the Water Manager. They also submitted that there are significant seasonal variations in the flow from Irish Spring, and in especially dry years the Spring dries up almost entirely between July and October.

Based on the evidence, the Board found that there is insufficient water flow from Irish Spring to support an additional licence, even for the reduced amount of 200 gallons per day. Further, the dry periods when Ms. Hopp would need to use the flow from Irish Spring were also the times when the flow from Irish Spring was very low.

Next, the Board considered whether the Water Manager should have cancelled the Third Parties' licence on Irish Spring for failure to make beneficial use of the water. The Board found that the scope of the present appeal was limited to the Water Manager's decision regarding the licence application, and did not extend to deciding whether a different existing licence should be cancelled. However, even if the scope of the appeal did include this issue, the Board concluded that there was beneficial use by the Third Parties, who provided evidence that they used the water for domestic purposes associated with a rustic cabin and small garden on Lot 12.

Accordingly, the appeal was dismissed.

## Domestic water licences confirmed but must cease use during drought conditions

2012-WAT-016(a) and 2012-WAT-031(a) Southeast Kelowna Irrigation District v. Assistant Regional Water Manager (Edward F. Lawrence, Brian and Kimberley McDivitt; Third Parties)

**Decision Date:** July 11, 2013

**Panel:** David H. Searle, CM, QC, Robert G. Holtby, Douglas F. VanDine

The Southeast Kelowna Irrigation District (the "SEKID") manages the water supply for ratepayers in an area near Kelowna, using a system of reservoirs to store water for use during the dry portions of the year. The SEKID holds water licences dating back to 1908 that authorize the diversion and storage of water. Most of the water used under the SEKID's licences is for irrigation purposes.

In 2008 and 2009, respectively, the McDivitts and Mr. Lawrence (the Third Parties in the appeals), applied for water licences on reservoirs that are part of the SEKID's system of reservoirs. They sought to divert and use the water for domestic purposes at their cabins located on leased Crown land adjacent to the reservoirs. The licence applications were referred to the SEKID, which objected to the applications on the basis that the reservoirs are within the Mission Creek watershed, which was designated as "fully recorded" in 1964, such that all water available for licensed use has been allocated, and there is no unlicensed water available to support new licenses.

In assessing the licence applications, the Water Manager considered technical reports on each of the applications. The technical reports noted the SEKID's objections, but recommended that the licences be issued on the basis that there was unused recorded water available in the reservoirs to meet the demands of the licences, and the amount of water needed for the licences was insignificant relative to the total volume of water stored in the reservoirs.

In August 2012, the Water Manager issued conditional water licences to the McDivitts and Mr. Lawrence. Both of the licences authorize the diversion of a maximum of 150 gallons per day for domestic purposes, between May 1 and October 31 of each year. The licences contain several conditions including a requirement to cease withdrawing water when the water level in the reservoir falls below 30% of the live storage volume (i.e., the volume of water stored above the reservoir's outlet), and a requirement that the licensee install a flow meter to record the volume of water diverted. Both of the licences were

issued with a cover letter stating that the water is intended for "indoor" domestic use, although that was not a condition in the licences.

The SEKID appealed the Water Manager's decisions to the Board on several grounds, including that the Mission Creek watershed is fully recorded, there is no unlicensed water available to support new licences, and the technical reports that supported the licences did not account for water discharged from the SEKID's reservoirs to support fisheries conservation according to the Mission Creek Water Users Plan. The SEKID also submitted that the 30% threshold for the licensees to cease withdrawing water was unfair, as it would allow them to continue withdrawing water when users of the SEKID's system would be under severe drought restrictions, contrary to the provision in the *Water Act* that licences with earlier precedence dates have priority over licences with later precedence dates.

The Board first considered whether the water sources for the new licences are fully recorded. The Board found that the water sources for both licences are tributary to Mission Creek, which the Ministry designated as fully recorded in 1964, and therefore, those water sources are fully recorded. However, the Board also found that a "fully recorded" designation is an administrative notation used by the Ministry to guide licensing decisions, is not legally binding. Neither the *Water Act* nor its regulations contain any statutory authority for such a designation. Furthermore, Ministry policies indicate that a fully recorded designation should be based on the information available at the most recent inspection. Consequently, the Board found that a fully recorded designation does not necessarily preclude the issuance of new licences on a water source, especially if a new licence involves a small quantity of water relative to the total stream flow, or if updated information indicates that the water source can support further licensed use.

Next, the Board considered whether there is sufficient water available to support the new licences. Based on evidence provided by both the Water Manager and the SEKID, the Board concluded that there is sufficient water to support the licences, given that the licences authorize the use of a small amount of water compared to both the water demand and the actual water usage from the reservoirs. The Board also considered the SEKID's agreement to release water from its reservoirs for fisheries conservation, and the fact that Mr. Lawrence and most other Crown lot lease holders have been drawing water from the reservoirs for years without licences.

Finally, the Board considered whether the conditions in the licences were appropriate. The Board held that some of the licence conditions should be amended. Specifically, regarding the water use specified in the licences, the Board accepted the Water Manager's recommendation that the licences be amended to state that all of the water was for "indoor" domestic use, which would better reflect the Water Manager's intention. Regarding the requirement to cease withdrawing water when the water level in the reservoir falls below 30% of the live storage volume, the Board found that the threshold was too low. The Board held that this condition should be amended to require the licensees to cease withdrawals when the SEKID is under stage 2 drought restrictions, as this would protect the SEKID's priority rights but would not affect the licensees often, given that stage 2 restrictions have only been imposed six times since 1955. Regarding the condition requiring the licensees to install flow meters, the Board held that there may be more practical and less costly ways to record water use, and the Board amended that condition accordingly.

Accordingly, the appeals were dismissed, subject to the amendments ordered by the Board.

## Appeal arises over the distribution of water rights among owners of subdivided land

2013-WAT-002(a) Katrina Sigloch v. Assistant Regional Water Manager (Patricia and Richard Prescott, Third Party)

**Decision Date:** October 18, 2013

**Panel:** Loreen Williams

Katrina Sigloch appealed a decision of the Water Manager to issue a new water licence to Patricia and Richard Prescott, in substitution for a pre-existing water licence issued in 1979. Ms. Sigloch and several members of her family are joint owners of land ("Lot A") adjacent to the Prescotts' land ("Lot B"). There is no residence on Lot A, but the Siglochs use it during the summer, and cultivate a garden and fruit trees on the property.

The original licence authorized the diversion of 1,500 gallons of water per day for domestic use. The original licence was appurtenant to a parcel of land (the "Original Property") that was subdivided into Lots A, B, and C in 2001. All of the subdivided lots border on McLeod Lake. After the subdivision, the ownership of Lots A and C was retained by the company that had owned the Original Property, but Lot B was sold.

In 2001, the owners of Lot B filed an application for apportionment, whereby all of the water rights associated with the original licence would become appurtenant to Lot B. The company that, at the time, owned Lots A and C consented to the apportionment. However, the application was not addressed by the Ministry until 2009.

Meanwhile, in 2003, Ms. Sigloch and members of her family purchased Lot A.

In 2009, Ms. McGregor submitted a statutory declaration in support of her previous application for apportionment. In the declaration, she stated that the historical and beneficial use of water under the original licence occurred solely on the part of the Original Property that became Lot B.

In 2010, the Prescotts purchased Lot B.

In February 2010, Ministry staff inspected Lots A and B, as part of the review of the application for apportionment. They saw no visible water use on Lot A. However, on Lot B, they saw water lines to a house and a garden, as well as evidence of livestock.

A few days later, the Ministry sent a letter by regular mail to the address listed in the land titles registry for the owners of Lot A (the Siglochs), advising that the original water licence needed to be amended or cancelled due to the subdivision of the Original Property. To determine whether the owners of Lot A may be entitled to part of the water rights under the original licence, the Ministry requested that they either complete a form that was attached to the letter, and pay the required fee, or, alternatively, indicate that they were abandoning their interest in the original licence. The Ministry received no response.

In November 2011, the Water Manager issued the new water licence to the Prescotts, in substitution for the original licence. The new licence authorizes the Prescotts to divert a total of 1,500 gallons of water per day from McLeod Lake: 500 gallons per day for domestic purposes; and, 1,000 gallons per day for industrial (stock watering) purposes. The Water Manager did not notify the Siglochs that he had issued the new licence.

In December 2012, Ms. Sigloch became aware of the new licence. Ms. Sigloch appealed the new licence on the basis that some of the water allocated under the new licence should have been allocated to Lot A, because Lot A was once part of the Original Property to which the original licence was appurtenant. Also, she submitted that she received no notice of the application for apportionment, or that the Ministry was considering apportioning the original licence. Ms. Sigloch requested that the Board reverse the decision to issue the new licence. Alternatively, she asked the Board to order that two new licences should

be issued in substitution for the original licence: a licence appurtenant to Lot A allowing the diversion of 500 gallons per day; and, a licence appurtenant to Lot B allowing the diversion of 1,000 gallons per day.

The Board found that section 3(5) of the *Water Regulation* does not require that notice be given to parties whose rights or land may be affected by the apportionment of an existing water licence. Rather, the notice provisions in section 3 of the *Water Regulation* deal with applications for new water licences. The Board also found that, although the apportionment decision in this case resulted in the issuance of a "new" licence, this new licence was issued in substitution for the Original Licence as a consequence of the apportionment. However, the Board noted that the Ministry's Policy Manual recommends that, when considering apportionment applications, notice should be provided to persons who have a valid interest in the lands within the appurtenancy of the original licence. Further, the Board found that the Water Manager was obliged, under the general principles of procedural fairness, to notify the Siglochs of the proposed apportionment, because their rights as land owners were potentially affected by the apportionment of the original licence.

The Board found that the Ministry had attempted to notify the Siglochs of the proposed apportionment, by sending a letter to the mailing address listed in the land title search for the owners of Lot A. Although the Siglochs claimed that they did not receive the Ministry's letter, the Board found that providing notification by regular mail was reasonable in the circumstances, particularly given that there was no indication that the rights under the original licence had ever been exercised on Lot A by the Siglochs. Thus, there was no evidence that the Siglochs were affected by the apportionment. Moreover, the Board found that the appeal proceedings provided the Siglochs with a full hearing on the matter, and therefore, the appeal process cured any defects in the Water Manager's notification procedure.

Next, the Board considered whether the original licence should have been fully reapportioned to Lot B, in the circumstances. The Board found that, based on the evidence of beneficial use, both historically and currently, it was appropriate to allocate all of the water rights under the original licence to Lot B. The Board also found that decisions regarding apportionment of existing water rights cannot be based on vague future plans for potential water use. In this case, the Siglochs had no tangible plans for potential water use, such as building a dwelling or raising livestock on Lot A, and the evidence was that they obtain sufficient water for their garden and fruit trees by drawing water from the lake and transporting water from their home by vehicle.

Accordingly, the appeal was dismissed.

## Board confirms an order to remediate unauthorized changes in a stream

2013-WAT-012(a) Jason Ralph Frank v. Regional Water Manager

**Decision Date:** November 19, 2013

**Panel:** Gabriella Lang

Jason Ralph Frank appealed an order issued by the Regional Water Manager, requiring Mr. Frank to remediate unauthorized changes in and about the channel of Coal Creek, in the Peace River Region of BC. Coal Creek runs through land that Mr. Frank purchased in 2012.

In early 2013, Ministry staff observed what appeared to be recently constructed or expanded road access to Coal Creek on Mr. Frank's property. Mr. Frank advised the Ministry that he had widened an existing trail with a bulldozer to provide access for a pump and pipes that brought water to a water storage dugout. The Ministry determined that the work had been done without authorization under the *Water Act*.

In April 2013, the Water Manager issued the order to Mr. Frank, requiring him to retain a qualified professional to prepare a plan for restoring the disturbed areas in and about Coal Creek. The order required that the plan be submitted to the Water Manager by May 31, 2013, and the remediation work be completed by June 15, 2013.

Mr. Frank appealed to the Board on the basis that the order did not contain the correct legal description of his property, and therefore, did not apply to his property. He also submitted that the order should be reversed, because he widened the existing trail with as little disturbance as possible to the ground, the widening caused no contamination of Coal Creek, and the remediation work would cause greater disturbance to the Creek.

The Water Manager requested that the order be confirmed, but that it should be amended to include the correct legal description of Mr. Frank's property, and that the timelines for submitting and implementing the plan be extended.

The Board found that the order incorrectly identified Mr. Frank's property, and there was no dispute that the activities that led to the order took place on Mr. Frank's property. Therefore, the Board directed the Water Manager to amend the order to reflect the correct legal description of the property.

In addition, the Board found that the evidence, including photographs of the site, established that widening the trail to access Coal Creek for the purpose of pumping water to the dugout constituted unauthorized changes in and about a stream, and resulted in increased sedimentation and a risk of ongoing erosion in Coal Creek. Consequently, the Board concluded that the order should be confirmed, other than the amendments to correctly identify the property, and extend the deadlines for submitting and implementing the plan.

Accordingly, the appeal was dismissed.

# *Wildlife Act*

## Angling Guide's bids for quota rejected

2012-WIL-016(c), 017(c), 018(c), 019(c), 020(c)
Walter Faetz et al v. Regional Manager (Guide Outfitters Association of British Columbia, Applicant)

**Decision Date:** April 18, 2013

**Panel:** Tony Fogarassy, Les Gyug, Ken Long

Walter Faetz and four other angling guides (the "Guides") appealed five separate decisions issued by the Regional Manager, Recreational Fisheries and Wildlife Program, Skeena Region, Ministry of Forests, Lands and Natural Resource Operations. In the appealed decisions, the Regional Manager denied the Guides' respective bids for angler day quotas on the Zymoetz River downstream of Limonite Creek ("Zymoetz II") for the 2012/13 season.

The Zymoetz II is a classified water under the *Angling and Scientific Collection Regulation*, B.C. Reg. 125/90 (the "*Regulation*"). Classified waters are designated in Schedule A of the *Regulation*. Schedule A also limits the number of guides on the particular water and the number of guided angler days available on that water during the specified – or "classified" – period. All of the Guides have taken clients to fish on the Zymoetz II in past years.

On April 1, 2012, amendments were made to Schedule A of the *Regulation* in relation to the classified period and the number of angling days available on the Zymoetz II. Previously, Schedule A only regulated the period from September 1 to October 31. Under the amendments, Schedule A was changed to regulate the "shoulder periods" (July to August and November to May), and reduce the previous guided angler days during the September to October period.

Following those changes, the Regional Manager required the Guides to submit bids in the form of sealed tenders and written proposals for the guided angler days available on the Zymoetz II during the new classified period. Before the Regional Manager requested the bids, he retained a consultant to provide information on the potential monetary value of angler days on the Zymoetz II waters. After reviewing the Guides' bids, the Regional Manager rejected all of them, partly on the basis that the bids were excessively low. Consequently, he issued no guided angler days on the Zymoetz II.

The Guides appealed the Regional Manager's decisions rejecting their bids. They submitted that the Regional Manager's decision-making process was unreasonable and unfair, and that he had no jurisdiction to award the new quota because there was no approved angling management plan in place for the Zymoetz II. The Guides Outfitters Association of BC supported the Guides' submissions.

The Regional Manager submitted that the Board should confirm the Regional Manager's decisions to reject the Guides' bids.

First, the Board considered whether there was an approved angling management plan in place for the Zymoetz II. The Board noted that both the *Regulation* and the *Act* refer to an angling "management plan." Section 11(1.1)(a) of the *Regulation* enables a regional manager to allocate angler day quota only if a management plan applies to the classified water. Section 52(3) of the *Act* requires the publication of a plan for managing guiding for fish and angling. However, the Board found that there are no content requirements for such a plan specified in the *Act* or in any regulation under the *Act*. The Board also noted that there is no requirement for such a plan to be agreed to by a consensus of stakeholders, or for a plan to take into consideration particular factors or information. There is only a requirement for a published "plan for managing guiding for fish and angling on a stream."

Applying that analysis to the facts in this case, the Board found that the Ministry of Environment published a document in 2010 that constituted an angling management plan for sections of the Zymoetz River. While not specifically labelled "management plan," the information in the 2010 document was clearly a "plan" for managing guiding and angling, and the information was published and widely available. Also, the 2010 document represented the culmination of years of information sharing, comment and review, and consultation of all stakeholders on the Zymoetz I and II. Although it would have been helpful if the Regional Manager had clearly communicated to stakeholders that the essential components of an angling management plan for the Zymoetz I and II were in place as of April 23, 2010, that lack of communication did not undo the fact that a Zymoetz I and II angling management plan existed as of April 23, 2010.

Next, the Board considered whether the Regional Manager's choice of process for allocating the new quota was reasonable. The Board concluded that the Regional Manager exercised his discretion reasonably when he decided to allocate the new quota by requiring interested parties to submit sealed tender and written proposals for the Zymoetz II.

Finally, the Board considered whether the Regional Manager's rejection of the Guides' bid proposals was reasonable. The Board found that the Regional Manager was under no legal obligation to allocate any or all of the angler days if the bids did not meet the objectives stated in the Ministry's request for tenders, which were to "make unallocated angler days available to angling guides in a fair, consistent and equitable manner and allow the Province to recover reasonable economic rent for the use of the resource." Once the Regional Manager determined that the bid amounts were excessively low, and would not allow the Crown to recover reasonable economic rent for the

use of the resource, he had the discretion to reject the Guides' bid proposals.

For those reasons, the appeals were dismissed.

## Permit to possess a live Gopher Snake denied

2013-WIL-044(a) Sarah Ardley v. Regional Manager
**Decision Date:** July 16, 2013
**Panel:** Reid White

Sarah Ardley appealed a decision of the Regional Manager, denying her application for a permit to possess a live gopher snake.

In or about January 2012, Ms. Ardley purchased the gopher snake from a pet store. Sometime after she acquired the gopher snake, she became aware that it was illegal to keep a gopher snake as a pet in BC, and she contacted the Ministry for information about applying for a permit to possess the snake. In November 2012, she applied to the Ministry for such a permit, and provided documents and photographs in support of her application.

In February 2013, the Regional Manager denied Ms. Ardley's application on the basis that the pet store where she acquired the snake had no permit to import or traffic this species, and the *Wildlife Act Permit Regulation* prohibits the issuance of a permit to possess wildlife that was taken, possessed, transported, or imported contrary to the *Wildlife Act* and the regulations, unless the permit is issued to an educational or scientific organization. Subsequently, the Ministry took possession of the gopher snake and relocated it to an educational facility.

Ms. Ardley appealed the Regional Manager's decision to the Board on several grounds, including that: she applied for a permit as recommended by the Ministry, only to have her application denied; the gopher snake is more of a pet than wildlife; this gopher snake is an American subspecies and is not representative of BC's wildlife; the gopher snake was not taken from the wild and probably wouldn't thrive in the wild due to its amelanism; and the gopher snake's best interests were not fully considered.

The Board found that all subspecies of gopher snakes are designated as "wildlife" under Schedule A of the *Designation and Exemption Regulation*. In this case, a permit is required under section 19 of the *Wildlife Act* in order to legally possess a gopher snake.

Next, the Board considered whether such a permit should be issued to Ms. Ardley. The Board found that the legislation did not allow a permit to be issued in this case. Specifically, the Board found that there was no evidence that the pet store where Ms. Ardley acquired the snake had authorization to possess or sell this species, and section 22 of the *Wildlife Act* states that it is an offence to "traffic" in live wildlife except as authorized by a permit or the regulations. The Board noted that "traffic" means to be in the business of bartering, buying or selling. In addition, section 6(1) of the *Wildlife Act Permit Regulation* prohibits the issuance of a permit to possess live wildlife that was "taken, captured, possessed, transported... or imported" contrary to the *Wildlife Act* and the regulations. The only exception to that prohibition is in section 6(3) of the *Wildlife Act Permit Regulation*, which allows the issuance of a permit to possess such wildlife if the permit is issued to an educational institution or a scientific organization for an educational or scientific purpose. Given that Ms. Ardley wanted to keep the snake as a pet, the exemption in section 6(3) did not apply.

Accordingly, the appeal was dismissed.

## Permit for dead Snowy Owl denied because of price at auction

2013-WIL-036(a) Francis Baller v. Regional Manager

**Decision Date:** August 7, 2013

**Panel:** Les Gyug

Francis Baller appealed a decision of the Regional Manager denying his application for a permit that would transfer the right of property in a dead Snowy Owl from the government to Mr. Baller.

Mr. Baller found the dead Snowy Owl on the side of a road. He applied for the permit so he could keep the Snowy Owl for the purpose of personal display. Under section 2(2) of the *Wildlife Act*, ownership in all wildlife is vested in the government, and a person does not acquire a right of property in any wildlife except in accordance with the *Wildlife Act*.

In February 2013, the Regional Manager denied Mr. Baller's permit application on the basis that the value of the Snowy Owl was greater than $200, and section 6(1)(d) of the *Wildlife Act Permit Regulation* prohibits the issuance of a permit transferring the right of property in dead wildlife that has a value greater than $200. Under section 6(2) of the *Wildlife Act Permit Regulation*, the value of the wildlife is determined based on the average price that the government receives at auction for wildlife of the particular species, of similar size and in similar condition. The Regional Manager determined that the average price the government received at auction for an adult Snowy Owl in average condition for the period from 2005 through to 2007 was $538. The Snowy Owl that Mr. Baller found was an adult in good condition.

Mr. Baller appealed the Regional Manager's decision to the Board on several grounds, including that the decision was unfair, and that the government's valuation of the Owl was outdated because the government has ceased conducting wildlife auctions. He argued that the Owl had no auction value; rather, it only had scientific value. He explained that the Ministry had advised him that the Owl would be sent to a university for study. He requested that the Owl's skin and feathers could be provided to him for mounting after the bird had been studied.

Based on auction sales data provided by the Regional Manager for Snow Owls sold from 2005 to 2008, the Board found that the average valuation of Snowy Owls was much greater than $200, and the minimum price at auction was $400. However, the Board also found that the language in section 6(2) of the *Wildlife Act Permit Regulation* indicates that wildlife auctions were intended to be an ongoing process, and therefore, once the government ceased conducting wildlife auctions, the prices received at auction lose relevance. As more time passes, the auction data becomes less up-to-date, and there is a risk that the application of outdated auction results will lead to absurd results, and/or reduce the confidence in the accuracy of the valuation to the point where the accuracy will be unknown.

In the present case, applying section 6(2) to determine the value of the Snowy Owl did not lead to an absurd result or one in which there was a complete lack of confidence, because the value of the Snowy Owl was far greater than $200. The Board also found that the other exceptions to the $200 value limit in the *Regulation* did not apply in this case, as those exceptions only apply if the wildlife is received in exchange for work performed for the government or of the person seeking the permit is applying on behalf of a charitable organization in BC. Consequently, the Board confirmed the Regional Manager's decision to deny Mr. Baller's permit application.

In addition, the Board recommended that the government amend section 6(2) of the *Wildlife Act Permit Regulation* if the government no longer intends to conduct wildlife auctions.

The appeal was dismissed.

## Guide Outfitter appeals Roosevelt Elk quota

2013-WIL-046(a) and 2013-WIL-047(a) Darren DeLuca v. Regional Manager of Fish and Wildlife (Coastal British Columbia Guide Outfitter Association, Participant)

**Decision Date:** October 31, 2013

**Panel:** David H. Searle, CM, QC

Darren DeLuca appealed two decisions issued by the Regional Manager with respect to the quota of Roosevelt Elk set out in his two guide outfitter licences for the 2013/14 guiding season. Mr. DeLuca is a guide outfitter operating on Vancouver Island. He guides hunters who pay to take part in a hunt for specific species of wildlife. Mr. DeLuca's annual guide outfitter licences are issued with one-year quotas and five-year harvest guidelines, which specify the number of animals of certain wildlife species that his clients may kill.

In January 2013, the Regional Manager sent a letter to Mr. DeLuca purporting to set a combined "tentative" one-year quota of two bull elk for his 2013/14 licences, and a "tentative" five-year harvest guideline of six bull Roosevelt Elk for the 2012 to 2016 period.

In April 2013, the Regional Manager issued Mr. DeLuca's guide outfitter licences for the 2013/14 season. One licence was issued with a one-year quota of one bull Roosevelt Elk, and a one-year (2013) harvest guideline of one bull Roosevelt Elk. The other licence was issued with a one-year quota of one bull Roosevelt Elk, and a one-year (2013) harvest guideline of two bull Roosevelt Elk. The Regional Manager provided no written reasons for the quotas and harvest guidelines.

Mr. DeLuca appealed both licences to the Board. He submitted that the Regional Manager erred by not providing five-year harvest guidelines, and not providing reasons for his decisions. Mr. DeLuca requested that the Board direct the Regional Manager to provide five-year harvest guidelines for Roosevelt Elk in Mr. DeLuca's licences, provide written reasons for his decisions as required by section 101(1) of the *Wildlife Act*, and add one extra bull Roosevelt Elk to the quota of one of Mr. DeLuca's licences.

First, the Board considered whether the Regional Manager's January 23, 2013 letter setting "tentative" quotas and allocations satisfied the requirement in section 101(1) of the *Act* that the Regional Manager "must give written reasons for a decision that affects" a licence or a guide outfitter certificate. The Board found that the Regional Manager's January 2013 letter setting "tentative" quotas and five-year harvest guidelines did not constitute a "decision" because it lacked finality. However, the Board held that the tentative one-year quotas discussion in that letter were consistent with the one-year quotas issued in the April 2013 licences, which are final decisions. In addition, the Board found that the lack of a five-year harvest harvest guideline the licences was not a fatal flaw. In his submissions to the Board, the Regional Manager explained that he instead chose to apply a one-year harvest guideline, and the Board found that his submissions constituted reasons for his decision. Moreover, all of the evidence and submissions were heard afresh by the Board, and this corrected any procedural errors in the Regional Manager's process.

Finally, the Board found that Mr. DeLuca had provided no compelling reason to vary the Regional Manager's decisions by adding one bull elk to Mr. DeLuca's licence.

Accordingly, the appeals were dismissed.

# Summaries of Court Decisions Related to the Board

During this reporting period, the BC Supreme Court issued one decision on a judicial review of a Board decision.

Lynda Gagne, Charles Henry Claus, Skeena Wild Conservation Trust and Lakelse Watershed Stewards Society v. Ian Sharpe in his Capacity as Delegate of the Director, *Environmental Management Act*, Environmental Appeal Board, Rio Tinto Alcan Inc., Emily Toews and Elisabeth Stannus

**Decision Date:** March 14, 2014

**Court:** BCSC, MacKenzie J.

**Citation:** 2014 BCSC 2077

Lynda Gagne, Charles Henry Claus, Skeena Wild Conservation Trust, and Lakelse Watershed Stewards Society (the "Petitioners") applied to the BC Supreme Court for a judicial review of a decision issued by the Board.

In April 2013, the Petitioners were among a group of eight appellants who appealed a permit amendment issued by the Director, *Environmental Management Act*. The permit is held by Rio Tinto Alcan Inc. ("Rio Tinto"), and authorizes the discharge of effluent, emissions, and waste from a smelter located in Kitimat, BC. Among other things, the amendment allows an increase in the smelter's maximum daily emissions of sulphur dioxide. After the appeals were filed, Rio Tinto applied to the Board to have the appeals dismissed on the basis that the appellants were not "persons aggrieved" by the amendment. Under section 100(1) of the *Environmental Management Act* (the "Act"), only a "person aggrieved" by a decision has a right (i.e., standing) to appeal the decision. The appellants submitted that they were "persons aggrieved" by the amendment, and therefore, they had standing to appeal the amendment. They also submitted that the Board should update its interpretation of "person aggrieved" to include persons with a genuine interest in the appealed decision, in keeping with recent court decisions on public interest standing in Canada.

In *Lynda Gagne et al v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-005(a) and 007(a) through 012(a), issued October 31, 2013), the Board first considered whether it should revise the legal test that it had previously applied to determine whether an appellant is a "person aggrieved" under the Act. The Board held that it has no jurisdiction to grant public interest standing, and the language in the Act provides no indication that the Legislature intended for "person aggrieved" to include persons with a "genuine interest." Accordingly, the Board confirmed that the appropriate test for an appellant to establish that they are a "person aggrieved" is as follows: whether the person has disclosed sufficient information to allow the Board to reasonably conclude that the appealed decision will, or may, prejudicially affect the person's interests.

The Board stated that, in practice, this test requires an appellant to show, objectively, that their interests will or may be affected, directly or indirectly, by the appealed decision.

The Board then considered whether each appellant was a "person aggrieved" by the amendment. The Board found that two of the eight appellants were "persons aggrieved" by the amendment, and therefore, they had a right to appeal the amendment. The Board held that the other six appellants had not established that they were "persons aggrieved" by the amendment, and therefore, they had no right to appeal the amendment.

Four of the six unsuccessful appellants filed a petition with the BC Supreme Court for a judicial review of the Board's decision. The four Petitioners argued that the Board had acted in a procedurally unfair manner when staff of the Board requested that Rio Tinto provide copies of certain documents that both Rio Tinto and the appellants had cited and partially quoted in their submissions. The other parties were not copied on this request. The Petitioners argued that this was unfair to them because the deadline for written submissions had closed, and they were not given an opportunity to make further submissions regarding the documents, contrary to the Board's Procedure Manual.

The Court first considered the degree of procedural fairness owed by the Board, in light of the rules of natural justice. The Court concluded that the key question was whether the Board complied with its own Procedure Manual, and not whether the petitioners had suffered any prejudice. The Court held that the Board was required to rigorously comply with its Procedure Manual. The Procedure Manual provides that, in deciding appeals, the Board would not request further information from a party without providing the other parties with notice and an opportunity to make submissions regarding that information. The Court found that, although there was no intentional misconduct by any party, the Board's request for documents from Rio Tinto was a breach of its Procedure Manual, and this breached the petitioners' right to procedural fairness.

The Court also held that that Board had applied the "balance of probabilities" standard of proof to the question of standing, and that this standard of proof was too rigorous. The Court held that appellants should only have to demonstrate on a *prima facie* basis that they are "persons aggrieved" when their standing is being decided as a preliminary matter.

Finally, the Court concluded that the Board is entitled to deference from the courts when deciding questions of standing, and should be reviewed on a standard of "reasonableness."

Accordingly, the Court directed the Board to reconsider whether the Petitioners had established, on a *prima facie* basis, that they are "persons aggrieved," based on the submissions and information that was before the Board when the preliminary hearing on standing concluded.

# Summaries of Cabinet Decisions Related to the Board

There were no orders by Cabinet during this reporting period concerning decisions by the Board.

APPENDIX I

# Legislation and Regulations

Reproduced below are the sections of the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* which establish the Board and set out its general powers and procedures.

Also included are the appeal provisions contained in each of the statutes which provide for an appeal to the Board from certain decisions of government officials: the *Environmental Management Act*, the *Greenhouse Gas Reduction (Cap and Trade) Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Water Act* and the *Wildlife Act*. Some appeal provisions are also found in the regulations made under the *Greenhouse Gas Reduction (Cap and Trade) Act* and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2013). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Although not provided below, it should be noted that, in addition to decisions of government officials, Part 3 of the *Environmental Management Act* gives district directors and officers appointed by the Greater Vancouver Regional District certain decision-making powers that can then be appealed to the Board under the appeal provisions in the *Environmental Management Act* referenced below. In addition, the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (not reproduced) allows the Oil and Gas Commission to make certain decisions under the *Water Act* and the *Environmental Management Act*, and those decisions may be appealed in the usual way under the appeal provisions of the *Water Act* and *Environmental Management Act*, as set out below.

## *Environmental Management Act*, (S.B.C. 2003, c. 53)

Part 8 – Appeals

Division 1 – Environmental Appeal Board

Environmental Appeal Board

93 (1) The Environmental Appeal Board is continued to hear appeals that under the provisions of any enactment are to be heard by the appeal board.

(2) In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

(3) The appeal board consists of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(4) The *Administrative Tribunals Appointment and Administration Act* applies to the appeal board.

(5 and 6) Repealed [2003-47-24.]

(7) The chair may organize the appeal board into panels, each comprised of one or more members.

(8) The members of the appeal board may sit

(a) as the appeal board, or

(b) as a panel of the appeal board.

(9) If members sit as a panel of the appeal board,

(a) 2 or more panels may sit at the same time,

(b) the panel has all the jurisdiction of and may exercise and perform the powers and duties of the appeal board, and

(c) an order, decision or action of the panel is an order, decision or action of the appeal board.

(10) The Lieutenant Governor in Council, by regulation, may establish the quorum of the appeal board or a panel.

(11) For the purposes of an appeal, sections 34 (3) and (4), 48, 49 and 56 of the *Administrative Tribunals Act* apply to the appeal board.

Parties and witnesses

94 (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person, including a person the appeal board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body, whose decision is the subject of the appeal or review, must give that person or body full party status.

(2) A person or body, including the appellant, that has full party status in an appeal may

(a) be represented by counsel,

(b) present evidence,

(c) if there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(3) A person who gives oral evidence may be questioned by the appeal board, a panel or the parties to the appeal.

Costs and security for costs

95 (1) The appeal board may require the appellant to deposit with it an amount of money it considers sufficient to cover all or part of the anticipated costs of the respondent and the anticipated expenses of the appeal board in connection with the appeal.

(2) In addition to the powers referred to in section 93(2) *[environmental appeal board]* but subject to the regulations, the appeal board may make orders as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

(b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.

(3) An order under subsection (2) may include directions respecting the disposition of money deposited under subsection (1).

(4) If a person or body given full party status under subsection 94(2) *[parties and witnesses]* is an agent or representative of the government,

(a) an order under subsection (2) may not be made for or against the person or body, and

(b) an order under subsection (2)(a) may be made for or against the government.

(5) The costs payable by the government under an order under subsection (4) (b) must be paid out of the consolidated revenue fund.

Decision of appeal board

96 If the appeal board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

Varying and rescinding orders of appeal board

97 The Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the appeal board.

Appeal board power to enter property

98 The members of the appeal board have, for the purposes of an appeal, the right to enter any property except a private residence.

Division 2 – Appeals from Decisions under this Act

Definition of "decision"

99 For the purpose of this Division, **"decision"** means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115 (4) [administrative penalties] have not been performed.

Appeals to Environmental Appeal Board

100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

Procedure on appeals

102 (1) An appeal under this Division

(a) must be commenced by notice of appeal in accordance with the prescribed practice, procedure and forms, and

(b) must be conducted in accordance with Division 1 of this Part and the regulations.

(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

Appeal does not operate as stay

104 The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Division 3 – Regulations in Relation to Appeal Board

Regulations in relation to the appeal board

105 (1) Without limiting section 138 (1) *[general authority to make regulations]*, the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing a tariff of fees to be paid with respect to a matter within the jurisdiction of the appeal board;

(b) prescribing practices, procedures and forms to be followed and used by the appeal board;

(c) establishing restrictions on the authority of the board under section 95 (1) to (4) *[costs and security for costs]* including, without limiting this,

(i) prescribing limits, rates and tariffs relating to amounts that may be required to be paid or deposited, and

(ii) prescribing what are to be considered costs to the government in relation to an appeal and how those are to be determined;

(d) respecting how notice of a decision under section 96 *[decision of appeal board]* may be given.

## *Environmental Appeal Board Procedure Regulation,*

(B.C. Reg. 1/82)

Interpretation

1 In this regulation:

**"Act"** means the *Environmental Management Act*;

**"board"** means the Environmental Appeal Board established under the Act;

**"chairman"** means the chairman of the board;

**"minister"** means the minister responsible for administering the Act under which the appeal arises;

**"objector"** in relation to an appeal to the board means a person who, under an express provision in another enactment, had the status of an objector in the matter from which the appeal is taken.

Application

2 This regulation applies to all appeals to the board.

Appeal practice and procedure

3 (1) Every appeal to the board shall be taken within the time allowed by the enactment that authorizes the appeal.

(2) Unless otherwise directed under the enactment that authorizes the appeal, an appellant shall give notice of the appeal by mailing a notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

(3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested.

(4) The notice of appeal shall be signed by the appellant, or on his behalf by his counsel or agent, for each action, decision or order appealed against and the notice shall be accompanied by a fee of $25, payable to the minister charged with the administration of the *Financial Administration Act*.

(5) Where a notice of appeal does not conform to subsections (3) and (4), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice

(a) stating the deficiencies and requiring them to be corrected, and

(b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.

(6) Where a notice of appeal is returned under subsection (5) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.

Procedure following receipt of notice of appeal

4 (1) On receipt of a notice of appeal, or, in a case where a notice of appeal is returned under section 3(5), on receipt of an amended notice of appeal with the deficiencies corrected, the chairman shall immediately acknowledge receipt by mailing or otherwise delivering an acknowledgement of receipt together with a copy of the notice of appeal or of the amended notice of appeal, as the case may be, to the appellant, the minister's office, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(2) The chairman shall within 60 days of receipt of the notice of appeal or of the amended notice of appeal, as the case may be, determine whether the appeal is to be decided by members of the board sitting as a board or by members of the board sitting as a panel of the board and the chairman shall determine whether the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.

(3) Where the chairman determines that the appeal is to be decided by a panel of the board, he shall, within the time limited in subsection (2), designate the panel members and,

(a) if he is on the panel, he shall be its chairman,

(b) if he is not on the panel but a vice chairman of the board is, the vice chairman shall be its chairman, or

(c) if neither the chairman nor a vice chairman of the board is on the panel, the chairman shall designate one of the panel members to be the panel chairman.

(4) Within the time limited in subsection (2) the chairman shall, where he has

determined that a full hearing shall be held, set the date, time and location of the hearing of the appeal and he shall notify the appellant, the minister's office, the Minister of Health if the appeal relates to a matter under the *Health Act*, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(5) Repealed. [B.C. Reg. 118/87, s. 2.]

Quorum

5 (1) Where the members of the board sit as a board, 3 members, one of whom must be the chairman or vice chairman, constitute a quorum.

(2) Where members of the board sit as a panel of one, 3 or 5 members, then the panel chairman constitutes a quorum for the panel of one, the panel chairman plus one other member constitutes the quorum for a panel of 3 and the panel chairman plus 2 other members constitutes the quorum for a panel of 5.

Order or decision of the board or a panel

6 Where the board or a panel makes an order or decision with respect to an appeal, written reasons shall be given for the order or decision and the chairman shall, as soon as practical, send a copy of the order or decision accompanied by the written reasons to the minister and the parties.

Written briefs

7 Where the chairman has decided that a full hearing shall be held, the chairman in an appeal before the board, or the panel chairman in an appeal before a panel, may require the parties to submit written briefs in addition to giving oral evidence.

Public hearings

8 Hearings before the board or a panel of the board shall be open to the public.

Recording the proceedings

9 (1) Where a full hearing is held, the proceedings before the board or a panel of the board shall be taken using shorthand or a recorder, by a stenographer appointed by the chairman, for a hearing before the board, or by the panel chairman, for a hearing before the panel.

(2) Before acting, a stenographer who takes the proceedings before the board or a panel shall make oath that he shall truly and faithfully report the evidence.

(3) Where proceedings are taken as provided in this section by a stenographer so sworn, then it is not necessary that the evidence be read over to, or be signed by, the witness, but it is sufficient that the transcript of the proceedings be

(a) signed by the chairman or a member of the board, in the case of a hearing before the board, or by the panel chairman or a member of the panel, in the case of a hearing before the panel, and

(b) be accompanied by an affidavit of the stenographer that the transcript is a true report of the evidence.

Transcripts

10 On application to the chairman or panel chairman, as the case may be, a transcript of the proceedings, if any, before the board or the panel of the board shall be prepared at the cost of the person requesting it or, where there is more than one applicant for the transcript, by all of the applicants on a pro rata basis.

Representation before the board

11 Parties appearing before the board or a panel of the board may represent themselves personally or be represented by counsel or agent.

## *Greenhouse Gas Reduction (Cap and Trade) Act*

(S.B.C. 2008, c. 32)

Part 7 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

22 (1) For the purposes of this Part, "decision" means any of the following:

(a) the determination of non-compliance under section 18 *[imposed administrative penalties: failure to retire compliance units]*or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 19 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b), or

(b) a document evidencing a decision referred to in subsection (1) (c).

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 *[Appeals]* of the *Environmental Management Act* applies in relation to appeals under this Act.

## *Reporting Regulation*

(B.C. Reg. 272/2009)

Part 5 – General

Appeals to Environmental Appeal Board

32 (1) The following provisions are prescribed for the purpose of section 22 (1) (c) of the Act:

(a) section 13 (7) *[approval of alternative methodology for 2010]*;

(b) section 14 (2) *[approval of change of methodology]*.

(2) The following provisions of the *Environmental Management Act* apply in relation to appeals under the Act:

(a) section 101 *[time limit for commencing appeal]*;

(b) section 102 *[procedure on appeals]*;

(c) section 103 *[powers of appeal board in deciding appeal]*;

(d) section 104 *[appeal does not operate as stay]*.

(3) The *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82, is adopted in relation to appeals under the Act.

# *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*

(S.BC. 2008, c. 16)

Part 5 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

14 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 11 *[imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 12 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6(5) (d) (ii) (B) *[low carbon fuel requirement]*;

(d) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b),

(b) a refusal referred to in subsection (1) (c), or

(c) a document evidencing a decision referred to in subsection (1) (d)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 *[Appeals]* of the *Environmental Management Act* applies in relation to appeals under this Act.

# *Renewable and Low Carbon Fuel Requirements Regulation*

(B.C. Reg. 394/2008)

Part 4 – Appeals

Time limit for commencing appeal

21 The time limit for commencing an appeal is 30 days after the notice of administrative penalty to which it relates is served.

Procedures on appeal

22 An appeal must be

(a) commenced by notice of appeal in accordance with the *Environmental Appeal Board Procedure Regulation*, and

(b) conducted in accordance with Part 5 *[Appeals to Environmental Appeal Board]* of the Act and the *Environmental Appeal Board Procedure Regulation*.

Powers of appeal board on appeal

23 (1) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

(2) The appeal board may conduct an appeal by way of a new hearing.

# *Integrated Pest Management Act*

(S.B.C. 2003, c. 58)

Part 4 – Appeals to the Environmental Appeal Board

14 (1) For the purposes of this section, **"decision"** means any of the following:

(a) making an order, other than an order under section 8 *[minister's orders]*;

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) *[administrative penalties]* have not been performed.

(2) A declaration, suspension or restriction under section 2 *[Act may be limited in emergency]* is not subject to appeal under this section.

(3) A person may appeal a decision under this Act to the appeal board.

(4) The time limit for commencing an appeal of a decision is 30 days after the date the decision being appealed is made.

(5) An appeal must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*.

(6) Subject to this Act, an appeal must be conducted in accordance with Division 1 *[Environmental Appeal Board]* of Part 8 of the *Environmental Management Act* and the regulations under that Part.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(9) An appeal does not act as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

# *Water Act*

(R.S.B.C. 1996, c. 483)

Part 6 – General

Appeals to Environmental Appeal Board

92 (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) an owner whose land is or is likely to be physically affected by the order, or

(c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

(1.1) Despite subsection (1), a licensee may not appeal an order of the comptroller or a regional water manager to cancel in whole or in part a licence and all rights under it under section 23(2) (c) or (d).

(2) An order of the comptroller, the regional water manager or an engineer under Part 5 or 6 in relation to a well, works related to a well, ground water or an aquifer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner, or

(c) the owner of the land on which the well is located.

(3) An order of the comptroller, the regional water manager or an engineer under section 81 *[drilling authorizations]* may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner,

(c) the owner of the land on which the well is located, or

(d) a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

(4) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given

(a) to the person subject to the order, or

(b) in accordance with the regulations.

(5) For the purposes of an appeal, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise,

which ever is earlier.

(6) An appeal under this section

(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the comptroller, regional water manager or engineer, with directions,

(b) confirm, reverse or vary the order being appealed, or

(c) make any order that the person whose order is appealed could have made and that the board considers appropriate in the circumstances.

(9) An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

# *Wildlife Act*
(R.S.B.C. 1996, c. 488)

Reasons for and notice of decisions

101 (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or

(b) an application by a person for anything referred to in paragraph (a).

(2) Notice of a decision referred to in subsection (1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise, whichever is earlier.

(4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

Appeals to Environmental Appeal Board

101.1 (1) The affected person referred to in section 101(2) may appeal the decision to the Environmental Appeal Board continued under the *Environmental Management Act*.

(2) The time limit for commencing an appeal is 30 days after notice is given

(a) to the affected person under section 101 (2), or

(b) in accordance with the regulations.

(3) An appeal under this section

(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(6) An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

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